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THE UNIVERSITY OF ALBERTA

A Legal Analysis of Corporal Punishment in Schools

by

Bryan W. Pritchard ©

A THESIS
SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH
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Date: Oct 13, 1989

To Deborah Lyn and Deborah Ann

ABSTRACT

This study dealt primarily with how specific sections of the Charter of Rights and Freedoms, particularly ss. 1, 7, 8, 12, and 15, will probably influence the issue of corporal punishment in Canadian public schools.

As a necessary premise to the examination of such sections on potential student rights, a historical analysis of corporal punishment was undertaken. Available data, as well as sociological and psychological theories, were also analyzed from several points of view.

Relevant legislation, such as the Young Offenders Act and Alberta's Child Welfare Act, was also examined and specific sections were evaluated relative to the issues under the ambit of this study.

American jurisprudence was referred to throughout the thesis, although such analysis was undertaken in separate sections in order to keep the examination as Canadian as possible. Therefore, the study was based on Canadian and English primary sources of case law and legislative enactments.

In conclusion, I have attempted to state the legal status of corporal punishment in Canada as at the date of the study. I have made recommendations pertinent to both law and educational administration in the hope that such will be of assistance in the formalization of progressive school policies and regulations. It is also hoped that the legal treatise part of this study will influence provincial governments to enact laws in conformity and within the intent of the Charter of Rights and Freedoms relative to corporal punishment.

PREFACE

Education as a political weapon could not exist if we respected the rights of children. If we respected the rights of children, we should educate them so as to give them the knowledge and the mental habits required for forming independent opinions; but education as a political institution endeavors to form habits and to circumscribe knowledge in such a way as to make one set of opinions inevitable.

Bertrand Russell, 1927
(1955, pp. 88-89)

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FOREWORD

Legal analysis, to a large extent, is the study of the use of words at a particular period of time in a particular factual situation. Each judicial decision is a picture of "reality" frozen in time. Court decisions, therefore, can be contrasted and compared from one jurisdiction to another through the use of logic and reasoning by way of analogy based within the conceptual framework of descriptive analysis.

Throughout the thesis reference will be made to court decisions outside the realm of the educational setting and although to the lay person such decisions may appear as having little relevance to school matters, I assure the reader it is accepted practice in all courts at all levels of jurisdiction. Likewise the use of "in my opinion" or "I conclude therefore" while expressions of personal opinions, are statements made objectively based upon legal interpretive analysis.

As a lawyer and student of law (LL.B., LL.M.) I have appreciated this opportunity to examine the issue of corporal punishment from both legal and educational administrative perspectives.

> . . . dilemmas . . . demand basic changes in administrators. They require new training, knowledge, and policies and a sloughing off of deeply entrenched practices of to-day's society. The practice of administration can become one of deepened dilemmas or of heightened achievements. We hold that a path to the latter is through further theory and research in educational organizations. (435)

Hoy, W.K., & Miskell, C.G. (1987).
Educational administration: Theory, research
and practice. 3rd Edition, Random House:
New York.

CHAPTER I

Introduction to the Study

A new legal era commenced on April 17, 1982 when the Canadian Charter of Rights and Freedoms became law in Canada. In this historic break from English rule, Canada became a free and independent nation with its own written constitution. The constitution is paramount and takes precedent over all statutes enacted by any level of government whether federal, provincial or municipal. It, therefore, could be referred to as the "supreme law" of the land.

The Charter contains specific "rights and freedoms" which ensure that all Canadian citizens have certain fundamental civil liberties that are entrenched and which can not be taken away by the whims of the government in current power. Under the former British North America Act, 1867, which is also embodied in the constitution, there is a separation of power between the federal and provincial governments, the power over education being delegated to provincial jurisdictions pursuant to section 93 of the Act. This in effect gives power to the provinces to enact any laws affecting all matters dealing with education that are not ultra vires their jurisdiction. Since the advent of the Charter such powers are limited and subject to the provisions of the constitution. The resultant problem for the policy-makers in education is, how will the courts interpret the sections in the Charter in matters affecting education?

The Charter can be allegorically and graphically referred to as a "skeleton" which awaits court decisions that will add the "meat" to the legal framework within which educational institutions must operate. As this treatise will show, the Charter is a powerful instrument for change that can challenge the decisions of those in authority who previously had unbridled power.

The purpose of this thesis will therefore be concerned with specific sections of the Charter which may have application to the issue of corporal punishment and student rights within the educational system. Sections 1, 7, 8, 12 and 15 will be examined and case law will be analyzed relative to the issues. In conjunction with the examination of the Charter, other relevant statutes such as the Child Welfare Act and the Young Offenders Act will be explored as collateral sources. Since there is a considerable body of case law in the United States of America, an American overview also will be proffered. Decisions emanating from other common law jurisdictions will also be examined wherever appropriate.

Purpose of the Study

The primary intent of this thesis is to examine the Charter in light of legal consequences to educational practitioners in the specific area of corporal punishment. Consequently, the questions to be examined are:

1. What is a current and legally valid definition of corporal punishment?

2. How may the Canadian Charter of Rights and Freedoms affect the administering of corporal punishment within the public educational system?

3. To what extent may student rights be violated by the administering of corporal punishment as a form of discipline by school officials?

Significance Statement

It is essential that teachers, educational administrators, parents, students, and the public at large, become aware of the full meaning of corporal punishment and of the probable consequences of the continued use of corporal punishment in the school system. Canadians generally, and most educators particularly, do not realize the massive and profound changes that the Charter could have for education. Manley-Casimir and Sussel (1986) warn educational authorities of the dangers of inaction and the retention of outmoded concepts: "Canada could be on the verge of a judicial revolution in educational governance similar in scope to what has occurred in the United States since the Brown decision" (p. 4).

It is hoped that this thesis will raise the level of awareness of those interested in these issues and thereby contribute to a more comprehensive understanding of the implications affecting the "rights" embodied in the constitution and other subordinate legislation.

Related Research

It is significant to note that there is a sparsity of both legal and educational research dealing with issues arising as a result of the Charter and its effect on the educational system. The major works of Bargen (1961), Enns (1963), McCurdy (1968), and Paton (1977) were undertaken prior to the enactment of the constitution. Although these works are relevant to an understanding of the issues addressed in this thesis, they are, unfortunately, only historical perspectives. The Charter of Rights and Freedoms may have and, in my opinion, will have a tremendous impact on the educational system, thereby rendering prior judicial decisions redundant in many areas of the law.

A review of legal and educational theses revealed only three Charter-based studies: Anderson (1983), Watkinson (1986), and Zacharko (1987). Anderson's research was an indepth analysis of section 23 on French minority rights. Watkinson's thesis addressed the issue of discipline in schools and provided insight into potential problems for educational administrators. It was, however, heavily influenced by American jurisprudence and thereby tended not to address issues from a Canadian perspective. Zacharko covered an amazing 78 legal and administrative issues. While a competent piece of work, the immensity of such an undertaking resulted in a summarization of the law based on secondary sources of information as opposed to indepth analysis of the primary legal precedents.

The leaders in the area of Charter-related issues in education appear to be Manley-Casimir (1982, 1983, & 1986), Nicholls and Wuester (1986) in Vancouver; MacKay (1984, 1985 & 1986) in Halifax; and Wilson (1985 & 1986) in Toronto. Unfortunately, Alberta lags far behind in legal-administrative research and apparently there is little impetus for change in the near future. Despite Zacharko's assertation "that the literature related to the educational implications of the Charter has expanded immensely in recent years" (p. 6), he acknowledges the need for a much deeper level of understanding:

> . . . recommendation is made to post-graduate educational administration departments and institutions to take affirmative action in the provision of advanced courses of study in school and constitutional law. The contention is that this knowledge is too important for our educational leaders to be left as an optional area of study. It is only through these officials that education will make the necessary adaptations to our changing, 'rights-conscious' society. (p. 139.)

Conceptual Basis of the Study

The basis of this study is one of descriptive analysis. It will be primarily conducted through analysis of judicial decisions on Charter issues, supplemented by rationale extracted from case law. The other primary source is that of legislative enactments which codify, abolish, extend, alter, or change the common law. Both primary sources will be examined under the strict operation of the doctrine of stare decisis. As a secondary source of reference, legal texts and articles will be used to emphasize points of law relevant to the issues under examination.

In addition to legal analysis, theories and concepts will be considered from other disciplines to the extent that they have a direct bearing on the issues under study. All other materials examined or cited will be external to the legal analysis and should be considered as collateral to the main thrust of this thesis. Since this study is primarily a legal treatise, it is, out of necessity, more formal in its presentation. Certain segments may not be too palatable to non-legal scholars, and I apologize beforehand for this inevitable set of circumstances.

This thesis, therefore, it is a study conducted through legal research, the methodology being the construction of a legal framework based upon study of actual cases relevant to the issues, the subject matter of this treatise.

Limitations and Delimitations of the Study

Limitations

It is not within the scope of this thesis to consider all statutes which may affect the interpretation of the Charter relative to the issue of corporal punishment. Consequently, the only legislation to be examined is that having a direct bearing on the issues under analysis. Neither is it possible to consider dicta emanating from court decisions which may have considered the issues under examination but which were primarily concerned with other points of law. An example of this limitation is the consequences of negligence flowing from the operation of the doctrine of in loco parentis.

This study should not be considered as being exhaustive on the subject matter and should be looked upon as one person's attempt to form legal opinions based on both objective analysis of the rationales of judges, legal scholars, educators and other points of view. It is therefore an attempt to examine, analyze, and report on certain specific issues as such issues relate to judicial interpretation of statute and case law.

Delimitations

This analysis is restricted to specific sections of the Charter that may affect the issues of corporal punishment and student rights. The basic premise is that the Charter does indeed apply to educational institutions, as substantive proof of this contention is outside the scope of this analysis. It still has to be decided by the Supreme Court of Canada if the Charter applies to education, although obiter dictum in court decisions at lower levels appears to support this proposition (McCutcheon v. Corporation of the City of Toronto, (1983), pp. 204-05; White & Pritchard, 1989, p. 5). However, there is evidence to the contrary (R v. H. (1986); Anderson, 1986 (ii), p. 3).

The rights of students in closely related issues, such as legal rights of fairness in hearings, due process generally, and particularly procedures under section 10 of the Charter are excluded from this study. Issues of "detention" and appeal procedures under the Alberta School Act, 1988 are also excluded.

The treatise is further delimited in its application to common law jurisdictions. Consequently, Quebec decisions referred to will be those cases only in the areas of criminal law and Charter issues (since Quebec operates under civil law and consequently does not recognise common law).

Definition of Terms

Legal terms in this study are used in their accepted legal meanings. Special meanings given to a term or concept will be clarified where they occur in the body of the text. Since there is no "acceptable" Canadian publication available, Black's Law Dictionary (1979) will be utilized as the primary source in the construction of the list of terms in this analysis. Exceptions will be duly noted. Other sources are sections of acts which provide elaborations of terms.

An effort will be made to translate technical legal terms into plain English. Therefore, Latin phrases and legal jargon have been kept to a minimum usage. Unfortunately, the nature of legal analysis inherently involves a formal mode of reasoning. Certain words and phrases have specific legal meaning which precludes simplistic translation. Also, certain legal doctrines cannot be separated from their Latin structural base. Consequently, it is impossible, in some instances, to simplify their meanings.

A Priori

Lat. From the cause to the effect; from what goes before.

A term used in logic to denote an argument founded on analogy, or abstract considerations, or one which, positing a general principle or admitted truth as a cause, proceeds to deduce from it the effects which must necessarily follow.

Assault - Criminal Code, s. 265 (1)

A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or ...

Audi Alteram Partem

Lat. Hear the other side, hear both sides.

No man should be condemned unheard.

Burden of Proof

Lat. onus probandi;

In the law of evidence, the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between parties in a cause. The obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.

Case Law

The aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudged cases, in distinction to statutes and other sources of law.

Child Abuse (Physical) - Child Welfare Act, S.A. 1984, c. C-8.1

s.3 (b) a child is physically injured if there is substantial and observable injury to any part of the child's body as a result of the non-accidental application of force or an agent to the child's body that is evidenced by a laceration, a contusion, an abrasion, a scar, a fracture or other bone injury, a dislocation, a sprain, hemorrhaging, the rupture of viscus, a burn, a scald, frost bite, the loss or alteration of consciousness or physiological functioning or the loss of hair or teeth.

Civil Law - Quebec

The system of jurisprudence held and administered in the Roman empire, particularly as set forth in the compilation of Justinian and his successors . . . as distinguished from the common law of England and the canon law.

Common Law

As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.

Due Process of Law

Law in its regular course of administration through courts of justice. . . . An orderly proceeding wherein a person is served with notice, actual or constructive, and has an opportunity to be heard and to enforce and protect his rights before a court having power to hear and determine the case.

Enabling Legislation

Term applied to any statute enabling persons or corporations to do what before they could not. It is applied to statutes which confer new powers.

Equity

Justice administered according to fairness as contrasted with the strictly formulated rules of common law. . . . The term "equity" denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men with men.

Fundamental Justice (Law)

The law which determines the constitution of government in a nature or state, and prescribes and regulates the manner of its exercise. The organic law of a nation or state; its constitution.

Hierarchy of Courts

Derivatively, any body of persons organized or classified according to authority, position, rank, or capacity.

[In the legal sense — an ordering of the courts in any jurisdiction according to importance within a juristic framework.]

In Loco Parentis Doctrine

Lat. In the place of parent; instead of a parent; charged, factitiously, with a parent's rights, duties and responsibilities.

Natural Law

. . . a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his nature, meaning by that word his whole mental, moral, and physical constitution.

Doctrine of Necessity

Quality or state of fact of being in difficulties or in need, a condition arising out of circumstances that compel a certain course of action.

Obiter Dictum

Lat. — By the way

Words of an opinion entirely unnecessary for the decision of the case. . . . A remark made, or opinion expressed, by a judge, in his decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the termination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent.

Positive Law

Law actually and specifically enacted or adopted by proper authority for the government or an organized jural society.

Prima Facie

Lat. At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary.

Procedural Due Process

Those safeguards to one's liberty and property... Central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must be notified.

Parens Patriae

Lat. "parent of the country"

... refers traditionally to role of the state as sovereign and guardian of persons under legal disability ... such as infants, idiots and lunatics.

Precedents

An adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law.

Ratio Decidendi

Lat. The ground or reason of decision. The point in a case which determines the judgement.

Stare Decisis. Doctrine

Lat. To abide by, or adhere to, decided cases.

Doctrine that when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where the facts are substantially the same.

Statute Law

An act of the legislature declaring, commanding, or prohibiting something; a particular law enacted and established by the will of the legislative department of government; the written will of the legislature, solemnly expressed according to the forms necessary to constitute the law of the state.

Substantive Due Process

Such may be broadly defined as the constitutional guarantee that no person shall be arbitrarily deprived of his life, liberty or property; the essence of substantive due process is protection from arbitrary and unreasonable action.

Uberrima Fides

Lat. The most abundant good faith.

A phrase used to express the perfect good faith, concealing nothing, with which a contract must be made.

Ultra Vires

Lat. Beyond; outside of; in excess of.

The term has a broad application and includes not only acts . . . prohibited but acts which are in excess of powers granted and not prohibited. . . . ultra vires act of a municipality is one which is beyond the powers conferred upon it by law.

Overview of the thesis

This chapter has outlined the nature and purpose of the study. The significance of the analysis for both education and law has been established. The study will be conducted within the methodological tradition of descriptive analysis. Related research has been mentioned and special considerations in the study of law have been discussed. Limitations and delimitations have been set and a list of definitions to be used have been presented in alphabetical order.

In chapter two, the concept of corporal punishment is introduced and the roots of corporal punishment examined from historical, religious and legal perspectives. Related literature, including survey data, psychological theories, sociological theories, and the incidence of corporal punishment is examined in chapter three.

Chapter four considers related legislation and discusses potential conflicts between statutes. Chapter five examines corporal punishment under the Charter of Rights and Freedoms and derived legal status of corporal punishment in Canada is proposed in chapter six. Chapter seven summarizes the study and offers recommendations in the hope that this thesis will be helpful in the formalization of progressive school policies and regulations.

I speak severely to my boy
I beat him when he sneezes;
For he can thoroughly enjoy
the pepper when he pleases.
CHORUS
WOW! WOW! WOW!

Lewis Carroll, 1862.
"Alice's Adventures in Wonderland"
(1971, p. 54)

CHAPTER II

The Concept of Corporal Punishment

Roots of Corporal Punishment

Corporal punishment has been a part of formal education from its inception. There can be little doubt that the reason for its acceptance was based in antiquity, on the basic premise that children were chattels of the parents and of little value to society. Williams (1979, p. 25), based on research by Scott (1932), observed that there appears to be no way of knowing when flogging as a form of punishment first began. Shalka's educated guess is that it is "much older than civilization and was probably universal among all primitive people" (Shalka, 1973, p. 20).

Cryan is of the opinion that corporal punishment finds its roots in three sources: (a) religious (b) historical (c) legal (1987, pp. 146-153). There can be little doubt that religion has been used to substantiate its continued use in school. It stems essentially from Proverbs 23:

> 13. Withhold not correction from the child; for if thou beatest him with the rod, he shall not die.
> 14. Thou shall beat him with the rod, and shalt deliver his soul from hell

Bergen (1984), in discussing an Alberta case, examined the rationale for the use of corporal punishment from the biblical perspective:

> A literal interpretation of Proverbs for Luyendyk [the accused] implied that the very act of physical punishment producted (sic) a direct effect in the elimination of "evil" from the punished person. The court did not question the sincerity of his motives but held that the severe and unorthodox forms of corporal punishment which were used were unjustified. (p. 15)

Williams (1979, pp. 27-33) pointed out other horrifying sections of the Bible which apparently sanctify the use of physical force against children:

Chronicles 28:3; 33:6 — burning children;
Joshua 6:26; Kings 16:34 — putting live children in foundations of buildings;
Leviticus 26:28, 29 — cannibalism of children

Williams (1979, p. 27) also drew attention to physical abuse of children in "Literary Heritage," notably nursery rhythms. However, Williams believes that the family is the breeding ground for violence. He points out that 25% of all homicides in America occur in the home, half of which are committed on spouses and one seventh on children (1979, p. 32).

Cryan's third category, legal, will be examined in great detail at a more appropriate juncture of this thesis.

The English Perspective

Corporal punishment in England dates back to antiquity and took many barbaric forms. In the early 1800s a school master in London published a book on "modern" types of corporal punishment which included the placing of a heavy piece of wood around a boy's neck and the use a contraption called a "caraven" which housed four to six boys in a portable pillory. This school master had a particular propensity for the "basket," wherein a boy was placed in a sack and suspended from the roof of the school. Such devices prompted Emblen (1969) to comment: "These devices sound today more like notes from the commonplace book of a Dachau sadist than the sober recommendations of a respected schoolman" (p. 338).

The Prevention of Cruelty to Children Act, 1904, which was embodied in the subsequent Children and Young Persons Act, 1933, contained an express exemption clause:

> s.1(7) Nothing in this section shall be construed as affecting the right of any parent, teacher or other person having the lawful charge of a child or young person to administer punishment to him.

The in loco parentis doctrine was firmly entrenched in the common law, although it was not a blanket transfer of all parental rights. In Hutt v. Governors of Hailey Bury College (1888), the court placed the doctrine in this context: "What amount of power is actually delegated by a parent to a master must depend upon the circumstances in each case" (p. 624).

In Williams v. Eady (1893) Lord Ether stated: ". . . the school master was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a schoolmaster" (p. 42).

Corporal punishment was construed to be more than discipline and control in Smith v. Martin & Kingston - Upon-Hull Corp., [1911]: ". . . the inculcation of habits of order and obedience and courtesy, such habits are taught by giving orders. . . " (p. 784).

The right to administer corporal punishment extends to acts of children on the way to school, a considerable distance from the school premises. Justice Collins in Cleary v. Booth, [1893] stated:

> . . . the duties of the master to his pupils are not limited to teaching . . . it is clear that he is entrusted with the moral training and conduct of his pupils. It cannot be that such a duty or power ceases the moment that the pupil leaves school for home; there is not much opportunity for a boy to exhibit his moral conduct while in school under the eye of the master: the opportunity is while he is at play or outside the school. . . . the authority delegated to the schoolmaster is not limited to the four walls of the school. (p. 469)

This philosophy was extended to the case of a boy who admitted smoking cigarettes after school hours and as a consequence was caned five times. In R v. New Port (Salop) Justices, [1929] the court held that a school regulation prohibiting smoking both on school premises or in public was a "reasonable" rule of conduct for school boys in the "public eye."

Reg v. Watson (1884) stands for the proposition that corporal punishment is not even regarded as an issue in that the justices refused to hear a case of an alleged assault on a pupil by a schoolmaster.

A conviction of a teacher who caused extensive bruising by caning a pupil's hand was overturned on appeal. The court was of the opinion in Gardner v. Bygrave (1889) that "the reasons given by the magistrate . . . namely, that 'caning on the hand, however inflicted, was necessarily attended by risk of serious injury,' was not sufficient to justify this conviction; it must therefore, be quashed" (p. 24).

Even as recently as 1955, the mass caning of 37 students in order to ensure a few guilty persons were punished was not only approved of, but the judge stated that he regretted that legal action was brought against the teacher (Hazel v. Jeffs, The Times, 11th January 1955).

It is therefore quite apparent that in England almost any kind of corporal punishment is permitted, two exceptions being permanent injury, such as a ruptured ear drum (Ryan v. Fildes [1938]) and death (R. v. Hopley 1860)). In other cases it appears that the school board, as employers will not be held responsible by way of vicarious liability.

Even where a school board expressly forbids the use of corporal punishment, such policy is not binding on teachers. In Mansell v. Griffen (1908), the court held:

> It does not seem to me that such regulations of which the parents know nothing qualify or limit the ordinary authority as to the administering of corporal punishment which a parent must be supposed to give school authorities when he sends the child to school. (p. 169)

More recently, Shalka (1973, p. 26) confirmed that Wales banned corporal punishment in 1968, and Edinburgh's primary schools banned the use of the cane in 1972. On August 15, 1987, the Education (No. 2) Act, 1986 abolished corporal punishment in England. Parker-Jenkins (1988) expresses the clear intent of the legislation:

> Where, in any proceedings, it is shown that corporal punishment has been given to a pupil by or on the authority of a member of the staff, giving the punishment can not be justified on the ground that it was done in pursuance of a right exercisable by the members of the staff by virtue of his position as such. (p. 10)

Parker-Jenkins (1988) is of the opinion that the "notion of in loco parentis is not rendered defunct as an educational doctrine by the Act, but there is clearly a pressing need for a basic redefinition of the concept." (p. 10) It, however, clearly takes away the common law doctrine of in loco parentis as a defence to an assault charge.

The American Perspective

The religious basis of corporal punishment in American schools is clearly documented. Raichle (1978) summarizes this contention:

> Still, the Puritan approach provides sanction for corporal punishment even though accompanying constraints have sometimes been overlooked. Clearly, Calvinists were as ambivalent about the role of love and fear in child nurture as we are today. (p. 32)

Piele (1979) feels that this notion of religious ardor also is reflected in traditional conservative, white middle-class values:

> Perhaps corporal punishment in American schools remains an important vestige of our Puritan heritage because its use is sustained by the belief of a considerable number of Americans (particularly in the South and Midwest) who hold fundamentalist religious convictions and of still others who consider that man is innately aggressive and therefore, according to this argument, bad. It is this latter notion, buttressed by considerable scientific and pseudoscientific evidence, that holds a particular fascination to many Americans. (p. 97)

The right to inflict corporal punishment either through the doctrine of in loco parentis or the necessity to maintain order in the schools is clearly given wide and liberal interpretation. In State v. Pendergrass (1837), cited with approval in several Canadian cases, the court appeared to state the American position with regard to corporal punishment very clearly:

> We think that rules less liberal towards teachers, can not be laid down without breaking in upon the authority necessary for preserving discipline, and commanding respect; and that although these rules leave in it their power to commit acts of indiscrete severity, with legal impunity these indiscretions will probably find their check and correction, in parental affection, and in public opinion; and if they should not, that they must be tolerated as a part of those imperfections and inconveniences, which no human laws can wholly remove or redress. (p. 418)

In a country in which individual rights are regarded as "inalienable" it is not surprising that the doctrine of in loco parentis, in particular, has come under attack. Gunn (1974) expresses the rights of the parents in this regard:

> However valid the concept of in loco parentis may have once been, such validity has now ceased. No longer should a Latin phrase continue to vest such broad discretion in school authorities. The recognition that parents are possessed of a fundamental right, and indeed an obligation, to bring up their children as they see fit, mandates that parental rights takes precedent over a doctrine that is no longer viable. (p. 685)

It is evident, nonetheless, that in the absence of "malice" or "serious endangerment to life, limbs, disfigurement, or permanent injury" (Cooper v. McJunkin (1853), Anderson v. State (1859)), corporal punishment may be administered by school officials, and like the English position extends beyond the "four walls" of the school environment (State v. Pendergrass. (1837); State v. Lutz. (1953); and Lander v. Seaver. (1859)).

As to whom may inflict corporal punishment, the Canadian position (Bargen, 1961, p. 127) is that it belongs solely to the teacher, while the English position (Re Basingstoke School. (1877), p. 119) appears to be that it can be delegated. American decisions are somewhat at odds. In Prendergast v. Masterson (1917) a superintendent was held not to have the power to administer corporal punishment:

> By the rules, the duty to maintain order and discipline in the schools was devolved upon the teachers, not on him, and the power to inflict corporal punishment on pupils was conferred upon the teachers, not on him. For the reasons stated we do not think appellee was a "teacher" within the meaning of the law that authorizes a teacher to chastise his pupil. The teacher the law has in mind, we think, is one who for the time being is in loco parentis to the pupil; who, by reason of his frequent and close association with the pupil, has an opportunity to know about the traits which distinguish him from other pupils; and who, therefore can reasonably be expected to more intelligently judge the pupils conduct than he otherwise could, and more justly measure the punishment he deserves, if any. (p. 247)

Definitions of Corporal Punishment

Black's Law Dictionary (1979) defines corporal punishment as "physical punishment as distinguished from pecuniary punishment or a fine; any kind of punishment of or inflicted on the body" (p. 306).

There are two components to the phrase "corporal punishment." The first part, "corporal," is the easiest component to define. Derived from the Latin corpus, it means of, relating to, or affecting the "body." In a "legal" definition, it is specifically used in relation to the human physical body and, in particular, the physical body of a child under 18 years of age.

Plato, according to Wesley (1979), defines "punishment" in contrast to "pleasure":

> Pleasure and pain I maintain to be the first perceptions of children, and I say that they are the forms under which virtue and vice are originally present (sic) to them . . . but particular training in respect of pleasure and pain, which leads you always to hate what you ought to hate, and love what you ought to love from the beginning of life to the end, may be separated off; and, in my view, will be rightly called education. (p. 1)

The term "punishment," therefore, presents somewhat of a problem. Bongiovanni (1979, p. 352) has concluded that there is no universal definition of "punishment," and after researching the disciplines of sociology, psychology, and law, I have come to the same conclusion.

An examination of the case law and statutes in Canada, England, and the United States of America has revealed a bewildering mass of descriptions, acts, actions and different usages and application of "punishment" in all sorts of different sets of circumstances.

Hyman and Wise (1979) are of the opinion that corporal punishment means: ". . . the infliction of pain by a teacher or other educational official upon the body of the student as a penalty for doing something which has been disapproved of by the punisher" (p. 4). The New York State Board of Regents opted for a succinct definition (Schimmel & Fischer, 1988): ". . . any act of physical force upon a pupil for the purpose of punishing that pupil" (p. 16).

Paquet (1982) points out, based on the factual evidence in actual judicial decisions that:

> the general definition of the term corporal punishment indicates it to be the infliction of pain, loss, or confinement of the human body as a penalty for some offence. . . . The infliction of pain is not limited to striking a child with a paddle or the hand. Any excessive discomfort, such as forced standing for long periods of time, confinement in an uncomfortable space, or forcing children to eat obnoxious substances fits the description. (p. 33)

Thorn (1971) places the definition in the Canadian context: "The law appears to be unequivocal in granting teachers the right to use corporal punishment which does include force in any form from holding to striking to strapping. The strap is not the only form of corporal punishment that may be used" (p. 2).

There is undoubtedly a need to expand the traditional definitions in light of the Charter, especially section 8 relative to the issue of search and seizure of the person generally and strip searches in particular. This redefinition will become apparent after a reading of Chapters V and VI. However, for the purpose of this thesis, Paquet's (1982) definition will be utilized.

Application of the Doctrine of In Loco Parentis

Blackstone (1765), in his Commentaries on the Laws of England, concisely defined the essence of the doctrine of in loco parentis:

> [The parent] may lawfully correct his child, being under age, in a reasonable manner, for this is for the benefit of his education . . . . He may also delegate part of his parental authority, during his life, to the tutor or school master of his child; who is then in loco parentis and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed. (p. 3)

This delegation of partial parental authority has been interpreted to include the right to administer corporal punishment which is presumed to be "reasonable" until proven otherwise. Justice Roberts in R. v. Corkum (1937) stated this basic premise:

> The fundamental legal principle I think is that the authority of a school teacher to chastise a pupil is to be regarded as a delegation of parental authority, and any punishment inflicted is presumed to be reasonable and for sufficient cause until the contrary is shown. (p. 80)

As will be shown in the English and American segments in this chapter (pp. 17-21), in loco parentis is firmly entrenched in the common law of those countries as well as Canada. However, its application in contemporary society has been challenged in the courts. In Murdock v. Richards, [1954] the court cited the following opinion from Prosser (1941, p. 167):

> It is sometimes said that the parent, by sending the child to school, has delegated his discipline to the teacher; but since many children go to public schools under compulsion of law, and the child may well be punished over the objection of the parent, a sounder reason is the necessity for maintaining order in and about the school. (p. 769)

The maintenance of order in the school issue will be addressed more fully in the statutory section, although suffice it to say, it has received high judicial support (Regina v. J.M.G. (1986)).

MacKay (1986b) agrees that statutory authority has "legally replaced the common law concept of in loco parentis as the core of educational authority" (p. 74).

Cryan and Smith (1981) criticize the application of in loco parentis from sociological and psychological points of view:

> The school/child relationship is intermittent, with different times of the day and year, very often superficial levels and for short periods of time. The parent/child relationship, on the other hand, is a lifelong, continuous relationship and ordinarily incorporates deep feelings of mutual love and affection. For this reason, corporal punishment inflicted by parents would have an entirely different effect than the same punishment meted out by school authorities. (p. 434)

I am of the opinion that Cryan and Smith's position has to be qualified in light of the high divorce rate and estrangement of spouses; no longer can it be stated that the parent/child relationship is continuous and lifelong. Cryan (1987) restates his position from an educational perspective:

> In today's school bureaucracy education is no longer voluntary, parents have little if any opportunity to choose among teachers or schools, teachers instruct children only part of the day, and few opportunities exist for teachers to form close relationships with children in large classes or schools. Moreover, the school-child relationship is intermittent, with different adults involved at different times of the day and year, very often at superficial levels. (p. 149)

The doctrine of in loco parentis has apparently been expanded to include a school bus driver (Regina v. Trynchy (1970)) and a counsellor (R. v. Nixon (1980-81)). Delegation of authority by the teacher appears not to have been addressed in Canada. The relevant case law in England and America will be examined in upcoming segments.

The Doctrine of Reasonableness

The Law Reform Commission of Canada, in a working paper on assault, delineated those types of situations in which the use of physical force on the body is permitted. Obviously, in emergency situations physical intervention is not only acceptable but necessary. A choking child is clearly in need of physical intervention as is a child suffering from injuries sustained in an accident.

The second exception is what the Commission referred to as "heat of the moment" situations, although in cases of injury to the child, even this category is questionable. The temporary loss of temper in stressful situations is deemed reasonable given the nature of active children and the frailties inherent in the human personality.

The third category is justifiable chastisement by a teacher of a misbehaving child. In Regina v. Trynchy (1970) where a bus driver grabbed a misbehaving seven year old boy by the arms and dropped him into his seat, even when a bump on the head was evident, the court felt the force was reasonable under the circumstances.

In the case of a counsellor who rapped a 21 year old retarded adult on the forehead with a metal spoon, the Supreme Court of Canada in R. v. Ogg-Moss (1984) held such behavior unacceptable. Although not a case in the school setting, the dicta contained in the judgement are of assistance as guidelines in the reasonable use of physical force by one person against another within the Canadian context:

> One of the key rights in our society is the individual's right to be free from unconsented invasions on his or her physical security or dignity and it is a central purpose of the criminal law to protect members of society from such invasions. I agree with the Attorney General that any derogation from this right and this protection ought to be strictly construed. (p. 92)

The Doctrine of Just Cause

Unjustifiable Intentions

Bargen (1961, p. 117) is of the opinion that once it has been established that school officials have proper jurisdiction (this issue will be examined at great lengths in the English segment) the court must ask two questions based on the factual situation in each case:

1. Was there just cause for the punishment?
2. Was the physical force used "reasonable" under the circumstances?

Gee and Sperry (1978) expand on Bargen's theory and view corporal punishment from a three dimensional perspective, more in line with contemporary judicial reasoning:

1. Was the motive behind the use of corporal punishment proper or improper?
2. Was the nature of the punishment suitable for the breach of discipline occasioned?
3. Was the degree of the punishment reasonable under the circumstances? (p. 43)

Due to the provisions of section 43 of the Criminal Code, I would add one further dimension, that the administering of corporal punishment must be by way of correction (Pritchard, 1989, p. 2). This contention differs from the "motive" dimension, contained in the Gee and Sperry framework, in that there may be occasions where the use of force may be properly motivated but fall outside the criterion of not "by way of correction." A slap on the back of the head in order to obtain a student's attention may fall outside the confinements of section 43 of the Criminal Code. For example, in R. v. Bick (1978-79), the County Court of Ontario stated that the striking of a student's head could not be considered correction and could also result in "possible danger of permanent harm" (p. 287).

Bargen's first question and Gee and Sperry's "motive" dimension are illustrated in the ancient case of Reg. v. Robinson (1899) where a teacher was cautioned ". . . not to punish wilfully (sic), maliciously, capriciously, or too severely" (p. 59). However, it was also held in Rex. v. Metcalfe [1927] that the onus is on those claiming improper motive. Brisson v. Lafontaine (1864) stands for the proposition that anger or bad temper are in and of themselves improper motives.

In the case of R. v. Haberstock (1971) a teacher slapped a boy on the face for alleged name calling. It turned out that the teacher was mistaken, the boy had not participated in the name calling; and although the force of blow resulted in a chipped tooth, the court held the force used was reasonable. The interesting issue in this case was not only the mistake on behalf of the teacher, but the fact that the slaps were administered three days after the incident. One has to wonder, after the passage of three days, whether the underlying motive was revenge. In rather tortuous reasoning, the Saskatchewan Court of Appeal concluded:

> Having found that the boy did not participate in the name calling, he [trial judge] should have directed his attention to the questions of whether there were reasonable and probable grounds upon which the appellant was justified in concluding that he did so. If there were such grounds, and the appellant administered the punishment in the honest belief that the boy had been guilty of conduct deserving punishment, then, if the punishment was reasonable, he would be excused from any criminal liability. Under such circumstances, a parent would be so excused, and, in my view, a teacher, exercising a delegated parental authority, is entitled to the same protection. (p. 435)

In R. v. Kanhai (1981), a case emanating from the same jurisdiction, the Saskatchewan District Court refused to apply and be bound by the Haberstock decision. This case involved a 14 year old male student who, while on a 12 minute running exercise, walked because he tired easily. The student was grabbed by the hair and his head was banged against a door. At trial, the teacher was found guilty of assault. The judge held the teacher acted on an honest belief that the student was deserving of punishment, but convicted the teacher for the use of excessive force. On appeal, Justice Geatros held that it was an honest belief but was not based on reasonable grounds.

Therefore, it is apparent that "just cause" must be based on the correction of improper behavior of the student and not the result of personal feelings of resentment, anger, or capriciousness on behalf of the school official.

Reasonable Force

The large majority of case law gives a liberal and wide interpretation to what constitutes reasonable force when applied to children in a school setting.

With the enactment of the British North America Act, 1867, Canada inherited all the common law and statutes in effect in the United Kingdom at the time that was applicable to the colonists' situation and condition (Pritchard, 1986, pp. 37-38).

An early case to consider reasonable force was Reg. v. Robinson (1899) in which a school master strapped the hands of a 14 year old student ,causing blisters and bruising. On appeal from a conviction of assault, the Nova Scotia County Court set guidelines which subsequent decisions would expand upon, and which virtually excuse vicious acts of punishment inflicted upon children. In quashing the conviction, the court was of the opinion:

> It is true that the pupil suffered some pain and inconvenience from the whipping he received on his hands, with the leather strap used for the purpose; but it caused no permanent injury, and all traces thereof soon disappeared . . .. The teacher who acts firmly, but kindly and mercifully, and inflicts punishment in moderation will, in most instances, and should in all cases escape an investigation of his conduct in the courts. (pp. 58-59)

Since that time, strapping on the hands, buttocks, back, legs, and even blows to the face have been adjudicated as reasonable force, for example Rex v. Gaul (1903); The King v. Zinck (1910;, Rex v. Metcalfe, [1927]; R. v. Corkum (1937); R. v. Haberstock (1971).

In one particular case, a female pupil was pulled from her seat by the arm, dragged into the hallway and strapped numerous times causing massive bruising to the arms, chest and back. Evidence of internal injuries to the ribs, rectal polypous, and head injuries were all dismissed as not caused by the administering of corporal punishment. In Murdock v. Richards, [1954] the Nova Scotia Supreme Court was of the opinion:

> I suppose that the fact is that the plaintiff offered some resistance and it is evident that at some stage she fell against one of the desks. This must have been by accident or by plaintiff's own resistance. (pp. 768-769)

In R. v. Dimmel (1980), a case of an exchange of blows after a shaking of a pupil by a teacher, the trial judge attempted to establish new standards for the 80s, and refused to apply R. v. Haberstock. On appeal from a conviction of assault by the teacher, the Ontario District Court opted for the status quo, quashed the conviction, and chastised the trial judge:

> As in the case of alleged assault, where self-defence is promoted, it is often said that one is not charged with the absolute duty to measure neatly the amount of force used in legitimate acts of self-defence and, in my view, the same considerations must apply here. A teacher cannot use unreasonable force under given circumstances, but to place such a strict measure on the degree of force he uses under those circumstances, as was done by the trial judge, again in my view, is not appropriate. (p. 243)

Due to the propensity of courts to apply a wide and liberal interpretation on what constitutes reasonable force, there have been few cases ruled to be excessive force. Clearly, in the instance where a teacher's actions are tantamount to cruelty, as in the case of a teacher strapping a student for 15 minutes causing serious injuries, such condu[illegible] will result in a conviction on assault charges (Brisson v. Lafontaine, (1864)).

It is difficult to imagine a set of circumstances that could be worse than the facts in Murdock v. Richards, [1954] and it is difficult to reconcile the decision of Andrews v. Hopkins (1932), a decision of the same court some twenty two years earlier. In the Andrews decision, a teacher was convicted of the use of excessive force in a factual situation that was similar to the Murdock case. A teacher administered the strap five times to each hand of an eleven year old female student. The strapping resulted in bruises from the hand to the elbow and there was evidence of bruising to the breast which required three months of treatment for chronic mastitis. The court held that although there was "no intention to injure" the teacher was negligent in the administering of corporal punishment.

In Campeau v. The King (1951) where a teacher smacked an eight year old boy's hand against a desk, the Quebec Court of Appeal stated:

> It may be that in the early 19th century cruelty to school children was permitted or condoned as being in their interests, but in the latter part of the 19th and present century the attitude toward corporal punishment has undergone a change and a teacher who so far forgets himself as to strike a child in any part of the body where permanent damage may be caused must take the consequences. (pp. 361-62)

The issues of permanent injuries and negligence were foremost in the mind of the court. However, the court added a further warning: ". . . of course the greater the mark left by the punishment the heavier the burden on the teacher" (p. 362).

Emphasis on the possibility of permanent damage was reinforced in R. v. Bick (1978-79) where the striking of a child's head was held to be excessive force. Sloan (1977, p. 31), Gee and Sperry (1978, p. 43), and Bargen (1965, p. 131) emphasize the possibility of the risk factors in how the punishment is administered. The three authors agree that in determining the degree of punishment administered, consideration should be given to the age, sex, size, physical and emotional strengths of the child.

The courts have given a wide and liberal interpretation to what constitutes reasonable force. Excessive force will apparently only be held in cases of permanent injury to the child and especially where blows are administered to the head.

Summary

This chapter has examined the historical, religious, and legal roots of corporal punishment from both American and English perspectives. Certain traditional definitions have also been examined. The doctrines of in loco parentis, "reasonableness," "just cause," and "reasonable force," have been analyzed from a legal point of view.

Consequently, it can be stated that the administering of corporal punishment in the school setting, while it has been abolished by statute in England and Wales, is still an accepted mode of discipline in Canada and America. Because of sections 43 and 265 of the Criminal Code, and modern case law, it may be necessary for the definition of corporal punishment to be expanded from ordinarily conceived traditional definitions. This is especially true in light of contemporary legislation and Charter rights, to be examined in chapters four and five respectively.

For boys and girls playing together, four lashes;
for failing to bow at the entrance of strangers,
three lashes; for blotting copy book, two lashes;
for scuffling, four lashes; for calling each
other names, three lashes. (Anon)

Cited by J. R. Cryan,
Manual of School Policy: "Good Old Days"
Childhood Education, (1987, p. 52)

CHAPTER III

Related Literature

This chapter examines the literature on corporal punishment, including its prevalence in society and psychological and sociological theories behind corporal punishment.

The collection of empirical data on the effects of corporal punishment on children is not possible. The study of children under controlled experiments, while pain is being inflicted, is unthinkable. Likewise, case studies or interpretive analysis through interviews with victims of corporal punishment, while possible, would be not be too fruitful because of the subjectiveness of both the interviewer and interviewee. Responses would be as varied as the backgrounds of the individuals involved. The very nature of pain would be the basis of strong emotional response and not intellectual reflection. Rose (1984) aptly summarizes the situation:

> There appear to be no applied empirically based studies that support the use of corporal punishment. . . . Rather, it seems that supportive evidence comes from clinical practice . . . or anecdotal studies. . . . Published reviews indicate that the effects of punishment in applied settings are still largely unknown. (pp. 427-28)

Even in the area of opinion surveys, the data are inconclusive and sporadic in application. Consequently, studies are sparse resulting in the following rather sketchy data.

Incidence of Corporal Punishment

School Boards

Shalka (1973) reports on a 1967 C.E.A. survey as follows:

> A Canadian Education Association survey of 118 of the larger school boards across Canada resulted in 75 replies of which 64 were usable . . . . Most of the regulations and policies recommend corporal punishment "as a last resort" measure. As to the actual practice of corporal punishment, school boards reported that this was infrequent. (p. 51)

In a subsequent survey Thorn (1971) observed: "One can conclude from this survey that fifty-two of sixty, or nearly 87 percent of boards do recognize the need for some corporal punishment under legal restraint and at least tacitly recommend its use" (p. 3).

McMurty (1987, p. 2) supports this situation with the most recent statistics, that 80% of Ontario's school boards allow and support the use of the strap in public schools.

Schools and School Districts

There appears to be no studies in Canada on how many schools actually administer corporal punishment. A massive survey of 2119 schools in England and Wales, some 45% of all the schools in the United Kingdom, revealed that 81% of the secondary schools surveyed "beat children, one every 19 seconds" (Society of teachers opposed to physical punishment, 1984, p. 1).

In the United States of America, a survey conducted by the Office of Civil Rights in the Department of Health, Education and Welfare in 1977 of a sample of 3,617 school districts comprised of 43,738 individual schools, reported that the number of formal incidents of corporal punishment was in excess of one million and a half (Rust & Kinnard, 1983, p. 91).

In a study of a medium school system in Tennessee of 10,000 students, Rust and Kinnard (1983) assessed the situation in rather strong terms:

> Educators who frequently use corporal punishment tend to be those with fewer years of experience. They were more likely to have been punished physically themselves while in school. Frequent users of corporal punishment displayed a relatively limited array of disciplinary techniques and tended to be comparatively closed-minded and rejecting of viewpoints which differed from their own. They also tended to be emotional, anxious, and impulsive. (p. 97)

Principals and Vice Principals

From a study of 200 principals and vice principals in Saskatchewan, Hindle (1987) concluded that administrators perceived corporal punishment to be of some value as a disciplinary measure. The analysis revealed the following statistics:

> 73.1% felt corporal punishment should be retained in schools.
> 96% seldom, rarely used, or never used corporal punishment.
>
> When corporal punishment was inflicted the following were cited as being the salient factors:
>
> defiant or disrespectful behavior 52.6%
> fighting 39.1%. (p. 3)

Paradoxically, 65% of the administrators felt that corporal punishment was ineffective as a means of encouraging students to accept responsibility (p. 3).

In a similar study in the United States of America of 232 principals, Rose (1984, p. 438) confirmed that 74.1% of the respondents administered corporal punishment. Rose made a remarkable finding: 100% of female principal respondents used corporal punishment as opposed to 70.3% of male principal respondents.

Parents, Teachers, Students, and Public

Two independent surveys in different parts of Ontario revealed that 89% and 92% of teachers felt that legal provision for corporal punishment should exist in the schools (Thorn, 1971, pp. 3-4).

Manning (1979, p. 59) confirmed an earlier finding by the National Education Association of America that 86% of teachers in the United States believed they had the authority to administer corporal punishment and that 77% believed they should have the authority to administer corporal punishment. However, at variance with Hindle's statistics (1987), only 30% admitted to having administered corporal punishment. These latter statistics suggest that in most cases teachers claim the right to administer corporal punishment and have relied on school administrators to carry out the actual punishment.

The Minister of Education of Ontario canvassed 2043 parents of whom 53% indicated that they approved the use of corporal punishment by the schools (1981). Of 2267 student responses, 50% were opposed to the use of corporal punishment in schools and only 16% thought that the strap made pupils behave better. The task force stated: "A possible conclusion from these findings is simply that the continued use of corporal punishment is the result of adult frustration over how to deal with the worst behavior problems in schools" (p. 7).

From a comprehensive study of 42 Edmonton schools in a random sample of 252 parents, 252 students, 84 teachers, and 42 administrators, Shalka (1973, p. 123) found that corporal punishment had been continuously reduced with each generation of pupils. The responses also indicated that the ". . . strapping pupils for not doing their best work does not make them achieve better" (p. 124). However, Shalka concluded: "In general, the attitudes of pupils, parents, teachers, and administrators in the Edmonton Public School System were favorable toward the strapping of pupils in schools" (pp. 126-27).

An independent public opinion poll was conducted by Gallup (1976) in a sampling of 1,558 adults, age 18 and over. As in six previous surveys, the problem most frequently mentioned was the "lack of discipline" in the schools at 25% (p. 2). On the question of student rights, Gallup concluded that the weight of public opinion was that students have "too many rights and privileges." (45%)

Despite the denunciation of corporal punishment which is evident in the literature corporal punishment is not only advocated by educational institutions but also administered in great quantities throughout Canada and the United States of America. Some scholars appear to perpetuate the myth of the non use of corporal punishment in Canadian schools. For example, Eberlein (1988) states: "This position [arguments for reasonable due process] would seem to be a reasonable compromise within the Canadian context, especially since corporal punishment is no longer a major issue here" [emphasis added] (p. 8).

It is the general consensus of opinion among educators that corporal punishment should be retained in the educational system and its continuing use has been documented (Canada: Thorn (1971, pp. 3-4); Shalka (1973, pp. 126-27); Gallup (1976, p. 2); Manning (1979, p. 59); Minster of Education, Ontario (1981, p. 7); U.S.A.: Rust & Kinnard (1983, p. 91); Rose (1984, p. 428); United Kingdom: STOP (1984, p. 1), McMurtry (1987, p. 2), Hindle (1987, p. 3)).

The massive study undertaken by the Society of Teachers opposed to Physical Punishment (STOP, 1984) clearly exposes the myth that corporal punishment was not a problem due to its infrequent use in England: "Official LEA statistics have already destroyed the myth that teachers 'rarely' beat children, and have shown that 'corporal punishment' is meted out at a lavish rate in many schools." (p. 1)

It also appears that although corporal punishment is still used in Canada (C.E.A. 1967, p. 9); Thorn, (1971, p. 2); Sloan, (1977, p. 24); Welch & Halfacre, (1978, p. 86); Hindle, (1987, p. 3), the gradual trend in Canada appears to be a "last resort" method which should be used sparingly. Thorn's statistics (1987) indicate the paradoxical problem facing administrators:

> although 96% of the respondents rarely used, or never used corporal punishment, 73.1% were of the opinion it should be retained in the schools. This trend has been substantiated in Ontario where it was documented that in the years 1969-70, 760 children were strapped in Toronto. In the 1970-71 period the number of children subject to corporal punishment had dropped to 196. (pp. 2-3)

Sloan's data (1977) also supports such a proposition:

> The general consensus of those in favor of corporal punishment appeared to be that it should be used sparingly and only as a last resort. Many who rarely or never used corporal punishment, however, saw great value in its existence as a deterrent. (p. 24)

The widely held view, that the retention of corporal punishment is necessary as a deterrent, not only to those upon whom it is inflicted, but also as a deterrent to the school populous as a whole, is also a myth.

Mayne (1987) capsulizes the problems in the form of a question: "How can educators justify such a severe form of punishment when they acknowledge its futility?" (p. 7).

The Minister of Education in Ontario (1981), commenting on Rutter's study in England, not only refuted the deterrent argument but also supported the contention that violence breeds violence: "This study found that pupil behavior was significantly worse in schools that used punishments frequently and that high levels of corporal punishment were particularly associated with the worst patterns of behavior" (p. 8).

The value of corporal punishment as a deterrent to further misbehavior of pupils was also dispelled in a study of 59 school districts in the United States of America where corporal punishment was abolished. It was documented that there was no noticeable change in the number of disciplinary problems in the schools (Hyman, 1979, p. 399).

The survey data suggest that corporal punishment is widely favored by school officials and the public. However, it appears to be declining in its actual use in Canadian schools.

Psychological Theories

Bongiovanni (1979, p. 354) argues that the use of children in experiments on the psychological effects of corporal punishment would be tantamount to a diabolical act. He postulates that such attempts to obtain empirical data would be both morally and ethically wrong. Bongiovanni concludes: "If it is morally and ethically wrong to empirically study the effects of corporal punishment on children, then surely it must be equally morally and ethically wrong to administer corporal punishment in the first instance" (p. 354).

However, the reality is that society legally allows and often advocates the use of corporal punishment in the schools despite research ethics.

Cryan and Smith (1981) believe that corporal punishment constitutes negative reinforcement thereby creating a larger problem than that which the administrator sought to correct in the first place. The authors provide evidence to support this proposition:

> According to modern behavioral psychologists, physical or social punishment constitutes negative reinforcement. As such, it has been found to be relatively ineffective in permanently changing pupil behavior because it must be continually repeated. Furthermore, a British study found corporal punishment to be worse than effective. The study revealed that corporal punishment contributes directly to misbehavior and juvenile delinquency outside of school. (p. 434)

Rose (1984) argues along the same lines and feels that violence breeds violence: "Nevertheless, it is clear that violent behaviors, either against persons or property, are the ones that most often result in corporal punishment" (p. 437). He further points out that this situation exists even where the punishment is delivered by a non-angered person and even 11.9% of those who advocate the use of corporal punishment felt it was ineffective on specific students (p. 438).

Notwithstanding Rose's position, Rust and Kinnard (1983, p. 94), in a recent study, examined the nature and temperament of those school officials who not only advocated the use of corporal punishment but who also administered the punishment, an average of 19 times a year. Rose found a significant relationship between a dogmatic personality, as assessed by the Rokeach scale and the use of corporal punishment. More significantly, Rust and Kinnard (1983, p. 94) found a direct correlation between Neuroticism scores and the reported use of corporal punishment:

> Thus neuroticism and dogmatism were intercorrelated and both related to use of corporal punishment. It is not surprising to find that those individuals who are easily upset, anxious, and emotional use physical punishment more often than relatively calm, even-tempered persons. It has been suggested by those who oppose the use of physical [punishment] that the technique is used sometimes to vent an educator's emotions rather than to improve the behavior of the child (National Education Association, 1972).

Bongiovanni (1979) takes both the apparent "victims" and appliers of corporal punishment into consideration when he concluded: "... corporal punishment cannot be effectively applied in the schools, and ... the use of corporal punishment is potentially harmful to both students and school personnel and thus contrary to the best interest and welfare of the student" (p. 355).

Sociological Theories

Sociologists are concerned with the study of individuals as they interact with other individuals and groups within society. The need for people to deal with each other in a reasonable and humane manner is becoming of greater importance in a seemingly shrinking world. The school environment is one of the prime sources of the socialization of a child, and with the apparent breakdown of the family unit (Pritchard, 1986, pp. 53-65), it becomes of even more importance that such an environment be one suitable to growth and learning (Bergen, 1984, pp. 13-15).

As Cryan and Smith (1981) point out, there is an increasing need for educational authorities to "respect the child's fundamental, constitutionally guaranteed personal rights" (p. 434). Further:

> it should not be unreasonable to hope that state educators will be swayed by the mounting evidence that violence in our classrooms only breeds more violence in and out of school. Consequently, it is worse than useless as a deterrent to misbehavior. It must be considered actively harmful. (p. 435)

Bandura (1969) is of the opinion that even mild aversive punishments lose their effect quickly, and to be of a lasting effect punishment has to be repeated to such an extent that the result must be almost traumatic to combat the effects of lack of reinforcement. Bandura advocates the use of "reward" alternatives to corporal punishment and Rutter (1980) supports this proposition in a rather interesting and provocative statement: "Good pupil behavior was also strongly associated with the teacher's style of discipline. The amount of formal punishment made little difference, but frequent disciplinary interventions were linked with more disruptive behavior in the classroom" (p. 185).

Rutter (1980) stresses Bandura's point of view with compelling data:

> Conversely, pupil behavior was much better when teachers used an ample amount of praise in their teaching. These results are in keeping with many experimental studies of teacher-child interaction which have shown the advantages of focusing on good behavior rather than on disruptive acts. (p. 185)

Bongiovanni (1979) believes that not only does corporal punishment facilitate aggression but the act of a school official in the administering of pain on an individual of lesser physical prowess or power, "provides the child with a real-life model of aggressive behavior" (p. 366). Eberlein (1986b) is of the opinion that this role-modelling will lead to imitation and the resultant perpetuation of aggressive behavior:

> The use of force demonstrates that adults view physical abuse as acceptable behavior and a suitable way of handling life's frustrations. Children will be led to imitate such aggressive behavior when dealing with their own problems. (p. 16)

Kounin (1979), from his observations of classroom behavior of both teacher and students in relation to role-modelling, contends that data collected from such studies are flawed for the following reasons:

1. the inability to obtain complete records;
2. behavior of teachers is impossible to record;
3. individual selectivity;
4. propensity to use "labels";
5. the tendency to make premature interpretations. (pp. 437-38)

Kounin (1979), however, did conclude that, notwithstanding the problems inherent to such case studies, useful information is extractable:

> In summary, it is possible to delineate what teachers do that makes a difference in how children behave. The role of a teacher and the dynamics of a classroom milieu are not haphazard phenomena. And even within a classroom, the dynamics of seatwork settings vary from the dynamics of recitation settings. There is evidently a lawfulness to classrooms which should make interrelationships potentially discoverable. (pp. 437-38)

Psychological and sociological theories appear not to support the notion that corporal punishment is useful in obtaining long range behavioral changes in students. Indeed, the evidence indicates that corporal punishment is psychologically and sociologically harmful.

Summary

The data, although sketchy, suggest that corporal punishment occurs in Canadian schools, though a high percentage of educators report that it is used "sparingly" as a "last resort." Studies have shown it to be ineffective in the long run, in bringing about changes to the inappropriate behavior of students in the school setting.

The statistics show that the overwhelming percentage of educators favour the retention of corporal punishment in schools and tend to downplay its use, even to the extent that it is not perceived to be a problem to be dealt with. This position is further supported by the unsubstantiated claim that it is necessary as a deterrent to further acts of misbehavior.

> Unless the cycle of child abuse from generation to generation is broken, the social deviance that is its heritage shall recur without end. Abuse turns the child towards aggression, violence and crime. We must break this vicious cycle.

Vincent J. Fontana.
"Somewhere a child is crying." New York: Macmillan
(1973, p. 261).

CHAPTER IV

Relevant Legislative Enactments

This chapter is a review of legislation relevant to corporal punishment. Contentious interpretation of the case law and moot points of law also are noted. The complications of various legislative provisions for the status of corporal punishment are dealt with in chapter five.

Williams (1979, p. 25) pointed out a very chilling fact, that legislation on prevention of cruelty to animals came before any laws protecting children. In fact, out of the Prevention of Cruelty to Animals Act of 1874 was born the impetus for the formation of the Act for the Prevention of Cruelty to Children (1874), based on the infamous case in New York in 1852, the Mary Ellen Wilson decision. The two societies subsequently merged to become the American Humane Society.

The history of societal attitudes towards children has been filled with horror stories, and the unfortunate truth is that such attitudes are fostered in the home and reinforced by the societal institutions of education and law. Williams (1979) offers a bleak view of society: "Beneath the surface of severe parental child abuse is a violence-ridden society which sanctions, contributes to, or is indifferent to pandemic violence against children" (p. 27).

Sohn (1986, p. 4), as Public Guardian for Alberta, reported that in 1982 there were 929,000 cases of reported child abuse in the United States of America. Closer to home, the reported cases in 1984 in Canada, amounted to 5,000. Sohn (1986, p. 4) feels that the reported cases are indicative of a larger problem and is of the opinion that cases of serious child abuse in Canada are in excess of 10,000 annually. He reiterates that: "historically, the home and the school have been involved in much of the exploitation and mistreatment of the world's children" (p. 3).

Criminal Code of Canada

The Criminal Code protects adults from assault, yet provides protection to teachers from criminal prosecution arising from the administering of corporal punishment to children in the educational setting:

> s.265(1) A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose;
>
> s.43 Every school teacher, parent or person standing in the place of a parent is justified in force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

Bargen (1961) is of the opinion that section 43 of the Criminal Code gives the right to teachers to administer corporal punishment in schools over the rights of the students, parents, school officials, and school boards and provincial legislatures: "Consequently the right to administer reasonable corporal punishment is established by federal law, and any excessive punishment of this kind is a criminal office to be dealt with under the provisions of the Canadian Criminal Code [Emphasis added] (p. 126).

Bargen (1961) expands this contention:

> It follows, then, that the use of force as a means of punishment falls within the jurisdiction of the Federal Government; and it is therefore beyond the jurisdiction of provincial legislation to forbid the use of reasonable force in disciplining the pupil. In addition, the term 'reasonable under the circumstances' cannot be limited or extended by provincial legislatures since they have no authority to modify a federal statute. Provincial legislation dealing with such matters, whatever its provisions, would be questionable in view of the above mentioned general powers granted by federal authority. [Emphasis added] (p. 125-26)

British Columbia is the only province in Canada to exercise its provincial authority. B.C. Regulation 436/81 O.C. 2183/81 states:

> 14(1) The discipline in every school shall be similar to that of a kind, firm, and judicious parent, but shall not include corporal punishment
>
> 14(2) No teacher shall administer corporal punishment to any pupil.

Bargen, I would submit, overlooked the basic fundamental operation of the law, and that is the common law can be changed by society acting through its duly elected representatives, in either provincial or federal jurisdiction. England is a prime example of this operation of law. In that country's long history of a common law resistance to change, it is an example of how a society's treatment of children in the schools through corporal punishment can be abolished by a legislative enactment. (Education (No. 2) Act, 1986)

School Act — Alberta

Authority to Maintain Discipline

It is interesting to note that, prior to the School Act of 1988, all previous School Acts in Alberta made minimal mention of children, students, or pupils. This situation would appear to substantiate the contention of Bertrand Russell (1955) when he concluded that education is used as a political weapon: "What is considered in education is hardly ever the boy or girl, the young man or young woman, but almost always, in some form, the maintenance of existing order" (p. 92).

According to Russell (1955) it is a "lack of reverence" for children and the natural consequences thereof, that such attitude is steeped in societal "evil":

> Contentment with the status quo, and subordination of the individual pupil to political aims, owing to the indifference to things of the mind, are the immediate causes of these evils; but beneath these causes there is one more fundamental, the fact that education is treated as a means of acquiring power over the pupil, not as a means of nourishing his own growth. It is in this that lack of reverence shows itself; and it is only by more reverence that a fundamental reform can be effected. (p. 99)

In Ontario, in Regina v. J.M.G. (1986) the court relied on s.236(a), the duty of the school officials to maintain discipline in schools. The court in considering whether a search of the person was justifiable by school officials, the court was of the opinion: ". . . the search here was reasonably related to the desirable objective of maintaining proper order and discipline" (p. 110).

Under the strict operation and application of precedent law, under the doctrine of stare decisis, the J.M.G. case could be easily distinguished in an Alberta court. There was, at the time of adjudication of the case, no similar statutory provisions in the Alberta School Act. This situation has subsequently been remedied in the School Act, 1988. Sections 13(f) and s.15(e) place the duty to maintain order and discipline squarely on the shoulders of teachers and principals respectively. "Students" are mentioned throughout the Act and Part I is specifically devoted to student rights and responsibilities.

The Department of Education in Alberta has no stand on the issue of discipline in public schools generally or corporal punishment specifically. The School Act, 1988, places the responsibility for the maintenance of order and discipline directly on the principal. Section 15(e) states:

> 15. A principal of a school must
> (e) maintain order and discipline in the school and on the school grounds and during activities sponsored or approved by the board.

Teachers, by the way of delegated power, have similar responsibilities. Section 13(f) states:

> 13. A teacher while providing instruction or supervision must
> (f) maintain, under the direction of the principal, order and discipline among the students while they are in the school or on the school grounds and while they are attending or participating in activities sponsored or approved by the board.

How the courts will interpret the various sections of the School Act, 1988, is not known. Suffice it to say the Act will, undoubtedly, be tested in the courts in the years to come. We must await those decisions which I hope will result in the identification of more appropriate ways of handling children in the school setting.

The only school act to specifically make mention of corporal punishment, as far as I can ascertain, is the Newfoundland Schools Act, R.S.N., 1970, c. 346. Section 84(1) states:

> Teachers are permitted to administer corporal punishment in reason and with humanity, but they shall refrain from the use of it, until other means of discipline have been tried, and striking children on the head is forbidden, and corporal punishment shall not be administered to delicate or nervous children.

Young Offenders Acts

Canada

The Young Offenders Act, R.S.C., 1985, c.Y-1, s.3(1)(e) specifically ties in Charter rights to young offenders relative to the criminal judicial system:

> Young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms.

This Act replaced the Juvenile Delinquents Act, R.S.A., 1970, c.J-3, and in so doing, changed societal emphasis from treating children as "misguided and misdirected" to persons with "rights and freedoms in their own rights" (White & Pritchard, 1989, p. 4).

Alberta

In Alberta, the Young Offenders Act R.S.A., 1980, c.S-26 and amendments thereto, including S.A., 1984, c.Y-1, created two new (although arbitrary) classes of offenders. Section 1(k) states the two classifications of children:

> "young person" means
>
> (i) on or before March 31, 1985, a person who is or, in the absence of evidence to the contrary, appears to be 12 years of age or more but under 16 years of age, and

> (ii) on or after April 1, 1985, a person who is or, in the absence of evidence to the contrary, appears to be 12 years of age or more but under 18 years of age;
>
> Section 1(b), establishes that "child" means a person who is or, in the absence of evidence to the contrary, appears to be under the age of 12 years.
>
> Section 5, states:
>
> No person shall be found guilty of an offence in respect of an act or omission on his part while he was a child.

Society, through the legislative process, I would submit, is signalling two clear intentions. First, "children" under the age of 12 have no responsibility whatsoever to society under criminal law, and second, "young persons" between the ages of 12 and 18 have certain degrees of responsibilities which must be accompanied by corresponding rights. In the latter instance, both the degrees of responsibility and corresponding rights have yet to be formulated through judicial process (White & Pritchard, 1989, p. 5).

The effects of the creation of these two classifications have received some media coverage although, obviously, there have been no reported cases. It appears that, at least in some cities, gangs of youths under the age of 12 are roving in a "Fagin" style of conduct, outside of police jurisdiction due to section 5 of the Young Offenders Acts (Canada) and (Alberta).

Child Welfare Acts

Alberta

The Child Welfare Act, S.A., 1984, c.C-8 was proclaimed law in Alberta on July 1, 1985, with certain specific sections awaiting clarification and proclamation. The Act defines three types of abuse: (1) physical, (2) sexual, and (3) emotional. For the purposes of this thesis, only physical abuse will be considered.

In a recent article, Pritchard (1989, p. 3) stated that searches of the person are the type of acts of physical contact on behalf of educators that falls under the contemplation of the Child Welfare Act as violations of the privacy of children within society. An expanded definition of corporal punishment might possibly include "physical indignities to the body."

Section 3(1) states:

> Any person who has reasonable and probable grounds to believe and believes that a child is in need of protection services shall forthwith report the matter to a director.

This short paragraph is full of directives and the operative parts can be broken down in specific steps:

1. "Any person" — means all persons legally resident in Canada
2. "reasonable and probable grounds" — mere suspicion is not enough
3. "to believe and believes" — both objective and subjective tests
4. "child in need of protection services" — specifically enumerated in sections 2 & 3
5. "shall forthwith" — mandatory, and must be done immediately
6. "report the matter to a director — any person designated by the Minister ie. a social worker pursuant to s.1(i)

More specifically, teachers and school officials who do not comply with section 3(1), must face the consequences:

> 3(5) . . . the director shall advise the appropriate governing body of that profession or occupation of the failure to comply.

More important is the penalty section 3(6):

> Any person who fails to comply with subsection (1) is guilty of an offence and liable to a fine of not more than $2,000 and in default of payment to imprisonment for a term of not more than 6 months.

The Alberta Teachers' Association (A.T.A., 1988) in its Members' Handbook, directs the membership to report child abuse in the following way:

> A teacher who has reasonable and probable grounds for believing that a child has been physically ill-treated or is in need of protection must report the situation to a child welfare worker. Failure to report, in addition to any civil liability, could result in a fine of up to $2,000 if the teacher is charged and

> found guilty. No action can be taken against the teacher for reporting suspected case of child abuse unless such is done with malice or without ground.

Clearly, the legislation is aimed at protecting children whose survival, security, or development is endangered. The implication that corporal punishment may involve the Child Welfare Act is clear.

Other Selected Statutes

It is interesting to note that through the Children's Service Act, S.N.S., 1976, C-8, the Nova Scotia government appears to discourage "reporting" by reducing the initial imposition of a fine to $1,000, but allows the court to inflict greater penalities wherever necessary $1,000 or 1 year in jail or both (Section 82).

In Ontario, prior to the enactment of the Child and Family Services Act, 1984, there were three reported cases, as far as I can ascertain, of failure to report involving professionals. In R v. Gordon (1924), a doctor failed to report a case of a communicable disease under the provisions of the Public Health Act. A case of diptheria was misdiagnosed by the doctor as tonsillitis. A conviction was quashed because mens rea was not proven; that is, the lack of a "guilty mind," or intent, on behalf of that person accused of failure to report.

In R v. Cook (1983), a doctor had been advised of sexual abuse of a female infant by her stepfather. The mother of the child had told the doctor that all the members of the family were in family counselling. The doctor failed to follow up, and the abuse continued. The charge of failure to report was dismissed by the court which held the proper test for professionals was that the Crown must prove beyond a reasonable doubt [the usual burden of proof placed on the Crown] the essential "ingredients of the offence." However, mens rea is not an essential ingredient to establish a conviction; a strange decision in that in nearly all instances evidence of criminal intent, both in the common law and in criminal legislation, requires the Crown to prove, beyond a reasonable doubt, the willful intent of the accused. Actual existence of "child abuse" is irrelevant to the requirements of the reporting section.

In the more recent case of R v. Stachula (1984), a doctor was advised that a 14 year old girl might have been impregnated by her brother. The doctor performed an abortion. The knowledge was acquired by the doctor in August of 1983, and reported in December of the same year. It was held that the Crown must lead evidence as to the standard of care of a given profession. Although the action against the doctor failed, the court did make a statement in obiter dictum, which may be of assistance to teachers in Alberta. R. v. Stachula (1984) stated:

> . . . there is a distinction which must be made between the various classes of such professionals and that there is no universal standard of care applicable to all such persons, but rather a standard of care particular to the class in question. (p. 188)

What that "standard of care" is for teachers in Alberta, has yet to be decided. One point which must be emphasized and which is absent from the A.T.A. publication is that if the alleged perpetrator is another teacher, the child welfare worker must inform the principal, the parents and the perpetrator of the alleged offence. The informant's name is held confidential subject to sections 1(3) and 91(4) (White & Pritchard, 1989, pp. 5-6).

It is of the utmost importance for all school officials to be aware of the joint publication of Alberta Social Services and Alberta Education (Protocol, 1989):

> It is important to note that under the law, regardless of internal procedures/policies for different school districts, the obligation to report lies with the individual and has not been discharged until he/she is certain that a report has been made to a director of child welfare or his delegate. (p. 5)

Conflicts Between Statutes

One of the definitions of conflict is found in Webster's Dictionary (1975): ". . . a mental struggle resulting from incompatible or opposing needs, drives, wishes, or external or internal demands" (p. 237). In the legal sense there are countless meanings attached to conflict, dependent upon which area of the law one is dealing with. However, when the conflict is between statute law and the common law, there is no conflict at all, the common law must always yield to statute law.

In the context, therefore, of corporal punishment under the common law doctrine of in loco parentis, and those types of acts, which according to the Child Welfare Act, 1984, amount to physical abuse inflicted on children, then at law, there really is no conflict at all, the legislative enactment must prevail. In this segment, therefore, I will first examine the relevant sections of the child welfare legislation and consider whether corporal punishment falls within the ambit of child abuse.

Second, such analysis will be contrasted against the rights of parents to discipline their children.

Finally, I will examine the "conflict" between seemingly opposing pieces of provincial legislation, i.e. the Child Welfare Act, 1984, and the School Act, 1988.

The Child Welfare Act, 1984, in Alberta, defines physical abuse as occurring when:

> 3(b) a child is physically injured if there is substantial and observable injury to any part of the child's body as a result of the non-accidental application of force or an agent to the child's body that is evidenced by a laceration, a contusion, an abrasion, a scar, a fracture or other bony injury, a dislocation, a sprain, hemorrhaging, the rupture of viscus, a burn, a scald, frost bite, the loss or alteration of consciousness or physiological function or the loss of hair or teeth.

The protocol agreement between the Alberta Social Services and Alberta Education (Protocol, 1989) further defines physical abuse as:

> unexplained bruises and welts:
>
> - on torso, back, thighs
> - numerous bruises of different colors
> - reflecting shape of articles used (cord, rope, belt buckle, clothes hanger). (p. 13)

Evidently, the statutory definition has been reduced to a "practical" working definition, no doubt in light of the basic nature of children and their innate propensity to injure themselves. However, this reduction, in my opinion, is unnecessary if one considers that the "duty to report" clause contains both an objective test and a subjective test. The teacher's personal knowledge of the individual children will determine whether an injury was likely self-induced (objective test), or the result of external forces (subjective test). Little Johnny, who is always playing rough, will likely not be of concern when evidencing bruises; but little Mary, who is bespectacled and frail, would warrant concern when bruising was evident. This two step approach, "has reason to believe," and "does believe," in my opinion mitigates against those in education who feel that it is an imposing duty to investigate every scrape or bruise. Common sense must prevail.

The potential conflict between Child Welfare legislation and the use of corporal punishment in the schools is an anomaly which the Minister of Education in Ontario (1981) clearly identified:

> The Ministry of Community and Social Services through its child-abuse control program is concerned over the use of corporal punishment in schools. They see the continued unrestricted use of the strap in schools as an apparent legitimization of the use of force in dealing with children when such force cannot be used in disciplining adults. (p. 7)

It is a further anomaly, that school officials may inflict physical pain on children to an extent that the parents cannot. This prompted Rosenberg (1978, pp. 107-108) to comment that child abuse laws that promote "physical and psychological well-being of the child" are at cross purposes when parents are prosecuted and the child is removed from the home, whereas teachers are immune. Rosenberg (1978) concluded:

> This apparent inconsistency between the neglect and abuse laws and the school corporal punishment legislation as applied, raises serious doubts whether the state is acting rationally in attempting to protect the welfare of its children. (p. 109)

This statement is particularly true, in my opinion, in the case where the Child Welfare Act, 1984 forbids the use of physical force against children and the School Act, 1988 apparently, statutorily permits corporal punishment when read in conjunction with s.43 of the Criminal Code. This will be particularly true if the rationale in the Regina v. J.M.G. (1986) case is applied in Alberta; that is, that school authorities have the right to maintain order and discipline within the schools by whatever means that are necessary. Clearly, this anomaly must be addressed by the provincial authorities or by a court of law.

I agree with both Williams (1979) and Friedman and Friedman (1979) when they said respectively:

> . . . outlawing corporal punishment bucks a settled tradition of countenancing such punishment when reasonable. (p. 34)
>
> Paddling and other forms of corporal punishment may cause tissue damage and we believe that any punishment which causes such damage clearly falls in the category of child abuse. (p. 340)

Summary

This chapter has examined relevant legislative enactments and the case law which has interpreted applicable sections which affect corporal punishment.

Section 43 of the Criminal Code does not authorize or empower the use of corporal punishment in schools because it is not enabling legislation. If it were enabling legislation then it would be an infringement of provincial rights to legislate in the areas of education, pursuant to section 93 of the Constitution act, 1982. What section 43 represents is a defence to a charge of assault brought against a teacher where acts of physical punishment are administered to a child under the jurisdiction of that teacher, and where the force applied is deemed reasonable under the circumstances.

Consequently, the province may legitimately legislate the abolishment of corporal punishment, if it so chooses to do. There is no conflict between the narrow application of s.43 in criminal law and the broad power to legislate in areas of education vested in the provinces.

In my opinion, whether or not the province legislates against corporal punishment, school boards may set polices and regulations forbidding the use of corporal punishment in schools under their jurisdiction. Furthermore, the boards may legislate for the dismissal of teachers or school officials for breach of such regulatory rules. The use of the criminal law in civil matters is neither compellable nor desirable.

The Young Offenders Acts, are an attempt by society to extend to children over 12 years of age certain rights which are embodied in the Charter of Rights and Freedoms. The Acts also provide for the assumption of degrees of responsibilities which correspond to such rights. As with all pieces of legislation, there are inherent flaws to be corrected, and, although outside of the scope of this thesis, those "rights" requiring clarification under the Young Offenders legislation, have their base in the Charter. These potential rights are more extensively examined in Chapter V of this thesis.

The use of corporal punishment, under the doctrine of in loco parentis, has been eroded to such an extent it is all but dead. It most certainly could be eradicated if the provincial legislature so wished. The use of corporal punishment under statutory authority of the School Act, 1988, not only flies in the face of the rationale of the Child Welfare Act, 1984, it also creates strange anomalies for parents, who are forbidden to use physical force against their children. Such parents must watch helplessly as school officials administer physical punishment, when they cannot. It is questionable wisdom to administer physical punishment under the doctrine of in loco parentis when such doctrine is based on the transfer of personal authority of parents to a school official within the educational milieu; especially when it is administered over the wishes of those parents who do not administer, or condone, the use of corporal punishment in the home.

The right to administer corporal punishment pursuant to the "discipline and order" sections in the School Act, 1988, in Alberta has yet to be legally decided. If Regina v. J.M.G. (1986) is applied in Alberta, and I have personal reason to believe it will be, then the province has created a "conflict" between two pieces of legislation which runs at cross purposes and makes a mockery of the joint protocol issued by Alberta Social Services and Alberta Education.

The dignity and integrity of the person will continue, therefore, to be at the forefront of the debate on children's rights especially since judicial corporal punishment has been decreed inappropriate for adults.

In the broader perspective, children in Europe are being regarded as having a status before the law, worthy of equal protection. Until, however, the political will is formulated to bring about similar reform in North America [and Canada], a fundamental disparity will exist between children living on opposite sides of the Atlantic.

M. Parker-Jenkins
Canadian School Executive
(1988, p. 11)

CHAPTER V

Charter of Rights and Freedoms

This chapter of the thesis will consider specific sections of the Charter of Rights and Freedoms, hereinafter referred to as the Charter, within the context of "student rights." Cases, both prior to and subsequent to the Charter, will be examined having regard to the intent attributable to each section in light of judicial reasoning contained in historical and contemporary jurisprudence in both England and Canada.

Due to the scarcity of judicial decisions in Canada in matters affecting education, an American overview will be proffered. A separate section has been implemented so as not to influence this Canadian study unduly. This is necessary as it is uncertain just how influential American jurisprudence will be in Charter cases. Traditionally, American case law has found limited uses in Canada and therefore is of little persuasion in Canadian courts. Due to its potential importance in constitutional issues an upcoming section will therefore be devoted to this issue.

Supremacy of the Charter

The Canadian Bill of Rights (1960), the forerunner to the Canadian Charter of Rights and Freedoms, was an Act of the federal government which passed in the House of Commons during the era of the late John Diefenbaker. The problem with this legislation was that it could be altered, amended, or even repealed, by a simple majority vote of the House of Commons because it was not entrenched in the Constitution.

The Canadian Charter of Rights and Freedoms, which is a part of the Constitution of Canada, along with the British North America Act, 1867, and amendments thereto, is firmly entrenched and cannot be repealed or amended without, essentially, the approval of the majority of the provinces in Canada and the federal government. The *Constitution Act*, 1982, is therefore the "supreme law" of Canada (*R*. v. *Big M. Drug Mart Ltd*. (1985)).

Although the supremacy of the *Charter* is unquestionably a fact in Canadian jurisprudence, one scholar has grave doubts as to its impact on Canadian society generally and specifically in educational matters. Manley-Casimir (1982) is of the opinion as follows:

> While the Constitution incorporates a radically new Charter of Rights, it may not change the fundamental traditions of the country—it may not alter the pervasive deference to traditional authority, the reluctance to litigate, or the elite accommodation in political evolution. These facts will mediate the extent to which the Charter of Rights and Freedoms will serve as a mechanism for legal challenge in general, and for legal challenge to educational practice in particular. (p. 21)

Cruickshank (1986) is more optimistic and suggests "that parents may be encouraged to litigate by the strength of legal challenges never before available. The results of even a few cases could change the entire fabric of Canadian public education" (p. 52).

Under the provisions of the *B.N.A. Act*, 1867, there is a division of powers between the federal government and the provincial governments. Education was given exclusively to the provinces pursuant to section 93 and is judiciously guarded by provincial legislatures from any attempts at intrusion by the federal government. A prime example of this jealously guarded power of authority was contained in the decision of the House of Lords, Privy Council, in *Tiny Separate School and the King*, [1928]. The court stated the province's position clearly: ". . . [the] provincial legislature is supreme in matters of education, excepting so far as sec. 93 of the B.N.A. Act restricts its authority" (p. 770).

The Supreme Court of Canada is now the final arbiter of all judicial decisions in Canada, under the *Constitution Act*, 1982, and has the continued responsibility to settle jurisdictional disputes between the federal and provincial governments. With the advent of the *Charter*, a third dimension has been added, the determination of individual rights and freedoms and the ability or inability of governments to encroach, limit, alter, or otherwise diminish fundamental human rights in a democratic society. Justice D. G. Blair of the Ontario Court of Appeal (1983) succinctly stated the status of the Charter in relationship to the judiciary: "The Charter has conferred immense power on the judiciary. It has become the ultimate arbiter in Canadian society on Charter issues, legally supreme over both the legislative and executive branches of government" (p. 445).

Thus, governments may make laws for the conduct or restraint of the peoples of Canada but ultimately the judiciary will interpret such edicts and strike impediments down whenever necessary, in order to protect those rights and freedoms guaranteed to all peoples living in Canada. This does not only apply to citizens of Canada but to all individuals with legal status in Canada, foreign officials and visitors excepted.

The application of the Charter to education and, more specifically, the rights of children within the educational system, are assumed. This assumption is based in logic, rather than law, because the issue has yet to be conclusively decided by the Supreme Court of Canada. Logically, the frequently used terms in the Charter: everyone, every citizen, any person, every individual, any member, citizens of Canada, anyone, must include children.

Use of American Decisions in Canadian Jurisprudence

Due to the fact that constitutional issues based on a written constitution are plentiful in the United States of America, it may very well be that the Canadian judiciary will be more inclined to make use of American decisions when considering Charter issues. Traditionally, Canada has relied on dicta emanating from the United Kingdom in all areas of the law. However, England does not have a written constitution and, therefore, in the area of constitutional law, there is a considerable void to be filled. Until such time as a discernible trend is perceived, the application of American jurisprudence in the Canadian context must be treated with the utmost of caution.

In Law Society of Upper Canada v. Skapinker (1984) Estey, J. was of the opinion:

> The courts in the United States have had almost 200 years of this task [constitutional interpretation] and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts. (p. 180)

The Ontario Court of Appeal in Regina v. Rao (1984, pp. 103-04) concluded that although there are important differences between Charter and U.S. decisions, nevertheless American experience "can be valuable."

These differences between the U.S. and Canada were studied by Cruickshank (1986) who pointed out that in the United States of America, the constitution emphasizes individual freedoms whereas Canada is concerned with the preservation of social order identified in the phrase "Peace, Order and Good Government" (p. 55).

Farley (1986, p. 28) and McConnell and Pyra (1989, p. 32) feel that American decisions will play an important role in Charter cases and this contention was supported by the Supreme Court of Canada in Hunter Dir. of Investigation & Research Combines Investigations Branch v. Southam Inc. (1985).

I believe that the opinion of the Ontario Court of Appeal in Regina v. Carter (1982) will prevail in the application of American jurisprudence in Canadian decisions:

> As to the authorities referred to, no doubt the decisions of courts of the United States of America may be persuasive references in some cases under our new Charter but it is important that we seek to develop our own model in response to present values on the facts of cases as they arise rather than adopting the law of another country forged in response to past events. (p. 44)

Preamble and the Balancing Provisions of Section 1

The preamble to the Charter states the basic premise upon which the rights and freedoms contained within the document are to be interpreted: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

The rights of the individual are not absolute and must be "balanced" against governmental rights contained in Section 1:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Apparently, the test for placing restrictions or limits on "rights and freedoms" is a four step process by the interpretation of the phrases: (1) "reasonable limits," (2) "prescribed by law," (3) "demonstrably justified," and (4) "in a free and democratic society."

Even from a common sense approach to an understanding of the interpretation of this process, it is evident that whatever "rights and freedoms" are guaranteed in the Charter, such are not absolute. In Quebec Assn. of Protestant School Boards v. A.G. Quebec (1983) the court held that the burden of proof lies upon the party claiming the "exemption" under section 1.

Watkinson (1986) feels that section 1 is further subjected to a two stage process:

> First, they must decide whether a challenged law has the effect of limiting one of the guaranteed rights. The proof at this stage is placed upon the individual challenging the law or government action. If the court agrees that the challenged law limits a guaranteed right, it moves to the second stage of deciding if the limit is a reasonable one. . . . (p. 24)

This proposition supports the notion that it is only governmental laws seeking to restrict, alter or impede, in some way, the right or freedom of an individual in society that are the subject of challenges. Under this premise, the Charter does not have application to disputes between individual entities within society, a position which Gibson (1983) argued against. He concluded: "If the Charter applies to all levels and all branches of Government in Canada, it follows that it must apply to the laws which are created by those governmental authorities" (p. 512).

Whether the Charter is restricted to public law by way of governmental laws, or extends into the private sector, it would appear that legal authority lies with the former position. The Saskatchewan Queen's Bench in R. L. Crain Inc. v. Couture (1984) stated the case for the individual within society: "[There is]...the need for compelling factors to justify placing the collective interests of society ahead of the rights of the individual." (p. 219)

The British Columbia Supreme Court in R. v. S.B., [1983, pp. 529-30] considered that the (Juvenile Delinquent's Act), forerunner to the Young Offenders Act, in that it failed to allow for a trial by jury for a juvenile, was unconstitutional. It was held not a "reasonable limit" in a "free and democratic society."

The Alberta Provincial Court in R. v. Bienart (1985, p. 10) held that although section 10(3) of the Department of Education Act contravened section 10 of the Charter (Freedom of Religion section), such was a reasonable limitation "prescribed by law" pursuant to section 1 of the Charter.

The Supreme Court of Canada held that the reverse onus clause under the Narcotic Control Act was unreasonable and not "demonstrably justified" in a "free and democratic society." In R. v. Oakes (1986) the court set down a two-fold conjunctive test:

1. The impediment to a right or freedom must be of sufficient importance and,
2. The means used to achieve the basic purpose of the infringement was the most reasonable under the circumstances.

The evidence must be cogent and persuasive and the methods used must be as unobtrusive as possible, relative to the nature of the right or freedom protected under the Charter (Singh v. M.E.I. (1985). Watkinson (1986, p. 27) points out a third dimension is to be placed on top of these rules: a "proportionality test" which must weigh the effects of the impediment against the objectives of the measure, in light of the "sufficient importance" criterion.

One final consideration which must also be addressed is whether or not section 1 applies to other sections of the Charter. That is, do the specific sections, such as s. 8 "Search and Seizure" contain its own modifiers? Is "unreasonable" in the context of search and seizure different from "reasonable limits" contained in section 1?

MacKay (1985, p. 285) argues that section 1 should not be applied to any provision which contains its own limitations. Watkinson (1986) disagrees and feels ". . . s. 1 will be considered regardless of whether or not a section of the Charter contains its own limiting modifiers" (p. 29).

Justice Deschenes, in Quebec Assn. of Protestant School Boards v. A.G. Quebec (1983), was of the opinion:

> It would require, therefore, a particularly strong argument to lead to the conclusion that one or other provisions of the Charter would nevertheless be sheltered from the limitations generally allowed by s.1. (p. 49)

Other case law will be examined in respect to such "balancing" provisions in upcoming segments.

Section 7 "Security of the Person"

The issue of whether the legal rights contained in sections 7 to 14 inclusive are ones subject to "procedural" or "substantive rights," or both, is outside the scope of this thesis. This issue is the subject of much debate by judges, lawyers and scholars. Suffice it to say, if the courts hold that such sections are subject to only procedural fairness and not substantive interpretation, such a position would seem to defeat the basic intent of the Charter. It could be possible for a court to hold that a law is procedurally fair but the final outcome would be ludicrous: for example, a death penalty for a nonsmoking violation. Section 7 of the Charter states:

"Everyone has the right to life, liberty, and security of the person and the right not to be deprived except in accordance with the principles of fundamental justice."

The term "security of the person" is a concept which may have far reaching effects on Canadian society. It may include rights affecting, not only the physical body of the person, but may also include rights in areas of employment and property. In Queen v. Fisherman's Wharf (1982, p. 307), the New Brunswick Queen's Bench gave an extremely wide and liberal interpretation to "security of the person." The court held that the phrase incorporated within its meaning "restaurant property" and considered loss of livelihood an infringement of "security of the person." There can be little doubt that, as a consequence of such a wide interpretation, the more narrow application to the physical body of a person must be included within the concept of "security of the person."

In References Re s. 94(2) of the Motor Vehicle Act (B.C.) (1986, p. 274), the Court subscribed to the principle that section 7 should be interpreted in a "generous" rather than a "legalistic" manner. In striking down an absolute liability section under section 94(2) of the Motor Vehicle Act (B.C.), the Supreme Court of Canada ruled that sections 8 to 14 inclusive, are tied into section 7 and, in using a "living tree" analogy, supported an expansionary attitude to the terms "life," "liberty," and "security of the person."

A physical search of the person is interpreted as a violation of the right to "security of the person." This proposition is supported by the Alberta Court of Appeal's decision in R. v. Lerke, [1986] where the search of an accused by an employee of a tavern was held to be in violation of section 7 of the Charter: "Any search of the person even if courteously conducted, is a serious intrusion of personal privacy and serious breach of one's Charter rights if invalid" (p. 400).

Although Watkinson (1986) primarily bases her opinion on American jurisprudence, she shares this proposition when physical force is used by teachers on students:

> There can be little doubt that corporal punishment is physical punishment. Therefore it is submitted that, at the very least, the courts will agree that corporal punishment is a violation of the right to either "liberty" or "security of the person," if not both. (p. 93)

Whyte (1983) also supports this specific contention and applies the dicta of the cases herein discussed in a wide and liberal interpretation of section 7 of the Charter:

> The rights referred to in section 7 arise in respect to any invasion of personal security (however defined) regardless of whether the process causing it is criminal or civil, judicial or administrative. In the absence of structural limitations the question posed by 'security of the person' is whether the phrase includes such things as livelihood, property, family, and other relationships, patterns of daily life, and generally matters which are essential to a person's capacity to act as an autonomous being. (p. 473)

The case law appears to support this contention and, in my opinion, the search of the physical body and clothing thereon will be held to be a violation of section 7, notwithstanding the Regina v. J.M.G. (1986) case in the school setting. The removal of a sock is minor in comparison to caning, strapping, hitting, slapping, or rough physical searches of the body of a student. Furthermore, the older the student the more intrusive the violation becomes.

Section 8 "Search and Seizure"

Search of the Person

As the previous section has intimated, section 8 must be considered when interpreting "security of the person": "Everyone has the right to be secure against unreasonable search and seizure."

Section 8 presented the Supreme Court of Canada great difficulty in the Hunter Dir. of Investigation & Research Combines Branch v. Southam Inc. (1985). The question of whether search and seizure is a "reasonable" limit under section 1 was not expressly pleaded, and therefore the court side-stepped the issue:

> I leave to another day the difficult question of the relationship between those two sections [ss. 1 & 8] and, more particularly, what further balancing of interests, if any, may be contemplated by s. 1, beyond that envisaged by s. 8. (p. 254).

The decision did, however, stand for the proposition that a warrantless search is prime facie "unreasonable" and applied American jurisprudence to the concept of "unreasonableness" under section 8. It must be remembered and emphasized that all remarks made were by way of obiter dictum and cannot therefore form part of binding legal precedent under the doctrine of stare decisis.

Fontana (1984) is of the opinion that Section 8 of the Charter is founded upon the following considerations:

> Section 8 is deceptively concise indicating that the words used in the section have been chosen by Parliament with care and deliberation. The keystone of the section is the word "unreasonable" which denotes, in the circumstances, that the drafters intended an element of flexibility in its application. (p. 293)

Referring to Dambrot (1983), Fontana (1984) further points out that any searches (including those conducted by school officials) are illegal, if the following interpretation is correct: "[Dambrot] postulates as well that the Charter s.8 may be applicable only to those searches conducted by or on behalf of the Crown or its agents and not to searches by private persons . . ." (p. 296).

The case law seems reasonably clear with respect to searches by private persons, although the situation is somewhat confused with respect to searches by peace officers. In R. v. Lerke [1986], the Alberta Court of Appeal, in condemning the search of an accused by an employee of a tavern, stated that "any search of the person, even if courteously conducted, is a serious intrusion of personal privacy and a serious breach of one's Charter rights if invalid" (p. 400). This position was alluded to in R. v. Soenen (1983) and extended to searches by police officers where the search is conducted on suspicion alone. In R. v. Stevens (1983), it was held that: "If the police officer searches on suspicion alone he has committed an illegal act, and one that, in my view, would be within the meaning of unreasonable in s.8 of the Charter" (p. 11).

The same was followed in R. v. Alainga [1985] and Regina v. Mutch (1986). The latter case confirmed the situation both before and after the enactment of the Charter:

> In my opinion, this evidence would be excluded without the passing of the Canadian Charter of Rights and Freedoms (s.8). Now that the Charter is in place, it is even less likely that evidence that Constable Schamborski found on the appellant is admissible. (p. 480)

In the Regina v. J.M.G. (1986) case, a high school principal had received information that a boy had been seen placing drugs in his socks. The principal, after witnessing the bizarre act of the student swallowing a cigarette, ordered the removal of shoes and socks. The learned judge held that the search was eminently reasonable and not in breach of section 8 of the Charter.

It would appear that the court has made an exception, within a school setting, where drugs are the basic issue. This position is supported, overwhelmingly, by American cases which will be examined at the appropriate place in this thesis.

In conclusion, therefore, it would appear that warrantless searches of the person are prima facie illegal and invalid subject to an exception in the case of the search for drugs where searches are deemed reasonable and not a violation of section 8 of the Charter.

Strip Searches

Upon arrest, an accused is not necessarily the subject of a strip search. In R. v. Morrison (1985) the court stated:

> The case law shows that the power to search on arrest knows certain limits. It does not automatically include, for example, the right to take samples of body fluids or to search bodily cavities. Nor in my view does it include the right to unclothe the person arrested unless the circumstances justify the action. [Emphasis added]. (p. 284)

In R. v. Fequet (1985), where an accused was locked up "half-naked," the court was of the opinion: "Surely, 'life, liberty and security of the person,' [must] include the dignity of the person" (p. 70).

There is, however, authority that in the case of drugs, the court will make an exception and allow strip searches. In R. v. Guberman (1985, p. 406) the court held that a strip search was not in violation of section 10 of the Charter (right to counsel). Following the reasoning in R. v. Therens [1985] the court concluded, by way of analogy, an accused may have a choice to blow or not to blow into a breatherlizer, but does not have a choice in whether or not he/she will be subjected to a strip search, where drugs are the basis for the search.

In the school setting, an Alberta community was outraged when a principal conducted a strip search of 23 students in the search for a stolen watch. This outrage was exemplified in an editorial comment by Balderson (1983):

> Rather than abide by these cumbersome [Charter] rights, the principal went for the quick fix, like Hitler and his henchmen: 'We were near the end of the school day and we were trying to clear this up.' Due process would take too much time for this principal. He preferred his own style of instant justice. (p. 36)

There appears to be very little relevant material in Canadian case law; consequently, American jurisprudence will be examined in greater detail later in this chapter. Examining the issue from the viewpoint of the doctrine of in loco parentis, in reverse; would a parent make a search of a child' s undergarments or body cavities? If the answer is still unclear, one thing that is obvious, in my opinion, in that the older the child the less the likelihood a parent would undertake such a course of action, even in the search for drugs.

Probable Cause and Reasonable Suspicion

The "probable cause" grounds clearly extends to cases where the accused attempts to swallow drugs in an effort to avoid their recovery (Scott v. The Queen (1975); R. v. Cohen (1983); R. v. Collins, [1985]) or where the accused consents to the search where drugs are involved (R. v. Gladstone, [1985]) (although "reasonableness" under section 8 of the Charter was not considered).

In a decision of the Provincial Court of Ontario on appeal to the Ontario District Court it was held in R. v. L.L., (1986) that where a school boy was ordered to empty his pockets in a search for stolen money which resulted in the finding of drugs, such a "voluntary compliance" was not unlawful. The search was based on second or third hand information; even so the court concluded: "The school authorities had good reason to question L. with respect to to the theft. They did not intend to obtain evidence for the purpose of criminal prosecution but only to help L. himself" (p. 5).

It seemed irrelevant to the court that in fact L. was prosecuted criminally and that his rights under the Charter or the Young Offenders Act were not even considered on appeal.

Contrasted against a police search on mere suspicion alone, the L. case is difficult to reconcile with other decisions involving search of the person. In R. v. Stevens (1983) the court stated:

> In my opinion no police officer has the right to search any person based upon suspicion alone. He must have reasonable and probable grounds for believing that the suspect is committing or has committed an offence. . . . (p. 110)

This appears to be the position in the United Kingdom. In Fitzgerald v. Northcote (1865), a search of a student's pockets was held to be reasonable. This rationale also formed the basis for the decision in Goldney v. King (1910).

Where school officials act in conjunction with the police, even where the accused were non-students and adults, searches made on mere suspicion alone, on school property, will be upheld. In R. v. Bent, [1987] it was held that searches based on suspicion alone, although found to be "unreasonable" under section 8 of the Charter were nevertheless allowed pursuant to section 24 of the Charter as not being acts that tend to bring the administration of justice into disrepute.

The J.M.G., R. v. L.L. and the Bent cases appear to have created a power of authority vested in school teachers which exceeds the authority and power extended to the police force. This situation is perhaps indicative of the special nature of the school within society, a point of law which ultimately must be addressed by the Supreme Court of Canada.

Section 12: "Cruel and Unusual Treatment or Punishment"

"Cruel and unusual treatment or punishment" in the Canadian context has primarily been restricted in its application to criminal matters, mainly because of the interpretation of "punishment" in relationship to governmental legislation. In R. v. Miller & Cockrail (1976), the Supreme Court of Canada had to consider whether or not capital punishment was "cruel and unusual treatment." This decision was a pre-Charter case and was an "academic pursuit" as the federal government, prior to the Court's decision, abolished the use of capital punishment. However, the Court concluded that the hanging of a person for a capital offence did not amount to "cruel and unusual" punishment.

It is likely, therefore, that lesser forms of punishment will not be held to be "cruel and unusual treatment." Therefore, a Deportation Order was not considered to be "cruel and unusual" punishment (Re Gittens and the Queen, (1982)); nor were the detention provisions for a "dangerous offender" under s.688 of the Criminal Code. Section 12 of the Charter was not violated by an "indeterminate detention" of an offender (R. v. Langevin (1984)); nor was the revocation of "mandatory supervision" upon a further Criminal Code conviction. Even an eight day jail sentence for driving an automobile, while under a licence suspension, was held not to be "cruel and unusual" punishment.

The Supreme Court of Canada in Re Miller and R. (1982) held that the phrase "cruel and unusual" should be read conjunctively although Chief Justice Bora Laskin strongly dissented. Laskin approved of the use of U.S. cases generally in Canadian decisions, and specifically the "disproportional test". In Mitchell v. A.G. Ont. (1983), a decision of the Ontario Supreme Court, followed Laskin's dissenting opinion and the "disproportional test":

> The absence of any definitive judicial pronouncements with respect to the meaning of the right guaranteed by s.12 of the Charter has forced me to come to my own conclusions as to its scope and effect. . . . In my opinion, the standard to be applied in determining whether the treatment or punishment is cruel and unusual is whether the treatment is so excessive as to outrage standards of decency and surpass all rational bounds of treatment or punishment. The test thus is one of disproportionalty: Is this treatment or punishment disproportionate to the offence and the offender. (pp. 252-52)

The court held that the continued detention of a non-dangerous habitual offender for property offences, mostly under $50 dollars, was a violation of section 12 of the Charter.

Anderson (1986, p. 195) feels that section 12, in relation to school legislation, will be simply a codification of "common law" principles and that the continued use of corporal punishment in the schools will not be affected by section 12 of the Charter. MacKay (1984) held a different opinion:

> It may be significant that the word "treatment" as well as "punishment" is used in the Charter. Treatment is broader than punishment and has less criminal connotation. On this basis it is possible that a Canadian court might find that section 12 of the Charter does prevent school officials from subjecting students to cruel and unusual punishment or treatment. A court will likely have to decide whether the use of a strap constitutes "cruel and unusual punishment" in the 1980's, or whether it is protected by the "reasonable limits" clause of the Charter. (pp. 83-84)

Two years later MacKay (1986b) moved from "it is possible to:

> I believe that Section 12 of the Charter will be applied to Canadian students. . .. It is likely that corporal punishment will be struck down as contrary to the

> Charter but it may take many years and more than one trip to the Supreme Court of Canada to produce this result. (p. 83)

Schmeiser and Wood (1985, p. 65) also support this proposition and Watkinson (1986) points out that the burden of proof for the retention of corporal punishment in schools rests solely on the school official:

> Those who would defend the use of corporal punishment will have to demonstrate that its use is prescribed by law, meaning that the authority to use corporal punishment is found in law that is clearly defined, ascertainable, understandable, and void of discretionary interpretation. Second, they must show that corporal punishment serves a legitimate and sufficiently important objective. Third, they must show that the means chosen to limit a right must be reasonable and demonstrably justified. (p. 16)

Section 15: Discrimination on the Basis of "Age" and "Sex"

I have been unable to find any decided Canadian case on section 15 of the Charter with respect to discrimination on the basis of age or sex. This segment, therefore, is not based in law, but in opinion and based on extremely limited data. American decisions may be of assistance in the assessment of a "North-American" trend. However, the reader is cautioned on the speculative nature of this segment.

In my opinion, section 43 of the Criminal Code clearly discriminates against children on the basis of age, in that it facilitates the use of physical force against human beings, and further, human beings not of sufficient maturity to be in a position to defend themselves against this form of punishment.

The Law Reform Commission of Canada (1984) shares this sentiment in a clear and succinct pronouncement:

> The singling out of children, whether on the basis of age or a relationship of dependency, raises concerns about how far the state may go to deprive individuals of their "security of the person" and whether those embraced by the exception would enjoy the "equal protection" of the Canadian criminal law. (p. 44)

The Committee expressed its opinion and, in so doing, there is evidence of a hint of "hard liners" hanging onto traditional values:

> — in short, that corporal punishment is seen as neither necessary nor suitable. This too was the view taken by most (though not all) of our consultants. In our opinion, therefore, section 43 should be repealed as a defence for teachers. (p. 44)

Eberlein (1986) commented on the Law Reform Commission of Canada's position in this way:

> Likewise it is the commission's view that the right to security of the person (Section 7) and the right to equal protection (Section 15(1)) would protect children from assault by teachers. . . . Student teachers need to learn how to anticipate and resolve problems in the classroom without resorting to violence. (p. 16)

Cruickshank (1986, pp. 52-55) feels that s.15(2) goes beyond the American 14th Amendment rights in that the Charter provides for disadvantaged groups or individuals through affirmative action.

Wilson and Tomlinson (1986) see "children" as one of the most disadvantaged groups within society:

> As a bottom-line position, and as a starting point, the effect of s.15 and the advent of a concept of "children's rights" must be to test, if not neutralize, the long-held untested and blanket presumptions of incapacity for those constituents of society identified as children. (p. 5)

In America, the 8th Amendment was tested in Ingraham v. Wright (1977), a case to be examined in the next segment, and the U.S. Supreme Court held that corporal punishment was not "cruel and unusual punishment" and that the 8th Amendment was restricted to criminals. Hyman and McDowell (1979) point out the ludicrous anomaly:

> The minority opinion of the Court in fact suggested that by restricting the Eighth Amendment's protection to criminals, children in school would have to commit criminal acts in order to be protected from harsh physical punishment by school authorities. (p. 3)

Corporal punishment could, therefore, be attacked under section 12 as cruel and unusual punishment especially in light of the inclusion of the world "treatment" in the phrase.

In an interesting study on the use of corporal punishment in American public schools (Rose, 1984, p. 439), the data support the generally accepted belief that corporal punishment is administered more to boys than to girls. It was found that 89.5% of respondents used corporal punishment on male students whereas the percentage dropped to 79.1% for females. More interesting was the fact that 11.1% of the respondents used corporal punishment on six or more female students opposed to 55.2% on male students in the same category. This major difference suggests that the frequency of corporal punishment increases for boys over girls. Rose (1984) concluded:

> Therefore, one may easily conclude that principals view corporal punishment as a sex-specific technique (i.e., it is appropriate and effective for boys and inappropriate and ineffective for girls.) (p. 439)

Therefore, I am of the opinion that corporal punishment discriminates against children on the basis of both "age" and "sex" under sections 7, 8, 12 and 15. Section 43 of the Criminal Code is clearly discriminatory against "children" as a class.

An American Overview

The U.S. Constitution has been in existence for over two hundred years and history has shown that there has been an intense struggle in the courts to define the rights of children within a democratic country. It has been evidenced that the power lies within the interpretation of a written constitution to affect and influence school policies in a dramatic and profound way.

As this thesis has shown, the eaffect of American jurisprudence on Canadian cases in a school setting has yet to be definitely settled, and therefore I have segregated discussion on the application of American decisions on Canadian jurisprudence in order not to unduly influence this legal treatise. However, American decisions have been cited with approval in Canadian cases; consequently, an examination of American jurisprudence, especially at a U.S. Supreme Court level, is not only desirable but an essential ingredient in any cogent analysis of student rights.

Amendments IV and VIII are the sections of the Constitution of the United States have held important implications for education administration (1986, p. 2105):

> IV
>
> The right of the people to be secure in their persons, houses, papers, and effects, against searches and seizures, shall not be violated, and no Warrants shall issue, but on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> VIII
>
> Excessive bail shall not be required, nor exclusive fines imposed, nor cruel and unusual punishments inflicted.

The basis for the protection of rights and freedoms in the U.S.A. is embodied in the phrase, "Life, liberty and the pursuit of happiness", whereas in Canada constitutional rights and freedoms are subject to "Peace, Order and Good Government". Consequently, while the words "life", "liberty", "security in their persons", and "cruel and unusual punishment" are similar in usage they have have different application in the Canadian contest. Caution, therefore, must be exercised when examining historical American cases in light of Canadian current legal issues.

Brown v. Board of Education (1954) affected education in a powerful and explosive manner. The U.S. Supreme Court's decision forced the State of Alabama to change its school policies on the segregation of white and black students in schools. It pitted state and federal authorities against each other and almost triggered another civil war based on the integration issue. Tinker v. Des Moines Independent School District (1969) witnessed the beginning of student rights:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of expression at the school house gate. (p. 506)

(a) Vagueness of restraints on individual rights and the "balancing provisions" under the Constitution.

It is a principle of law that an enactment is void for vagueness if its prohibitions are not clearly defined (Grayned v. City of Rockford (1977)). Alsager v. District Court of Polk County, Iowa (1975) explained the basic reasoning: "Vague statutes thus carry three dangers: the absence of fair warning, the impermissible delegation of discretion, and the undue inhibition of the legitimate exercise of a constitutional right" (p. 18).

In Doe v. Bolton (1973), the U.S. Supreme Court considered the application of statute law on 4th Amendment rights of "unreasonable searches and seizures" and of "probable cause":

> These rights are "fundamental", and we have held that in order to support legislative action that statute must be narrowly and precisely drawn and that a "compelling state interest" must be shown in support of the limitation. (p. 211)

In the granting of rights to the believers in the Amish religion to educate their own children, the U.S. Supreme Court examined the "balancing" consideration between state and individual in Wisconsin v. Yoder (1972):

> The State's interest in universal education is not totally free from a balancing process when it impinges on other fundamental rights ... and the traditional interest of parents with respect to the religious upbringing of their children. (p. 205)

In a judicial review of the action of a school board, in the suspension of a student, the Arizona Court of Appeal in Tucson Public School District 1 of Pima County v. Green (1972) was of the opinion that "arbitrary, capricious and unreasonable conduct" give rise to legal intervention:

> The terms "arbitrary, capricious and unreasonable conduct" so as to constitute a manifest abuse of discretion calling for judicial intervention means unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. (p. 864)

Sorenson (1986, p. 35) sees the correct balance between the state and the individual as one between the "degree of intrusiveness" and the student's "reasonable expectations of privacy "against the school's need to maintain a safe and orderly learning environment.

This "balancing" philosophy and inappropriate behavior on the part of school officials, giving rise to damages, was addressed by the U.S. Supreme Court in Wood v. Strickland (1975, p. 308). The court felt that where a student had confessed to "spiking" a punch bowl with alcohol, as a "prank", and where a school board had held a meeting without the knowledge of the girl or the parents, which resulted in a suspension, such acts were not done "in good faith" and found in favor of the student.

Roos (1983) after reviewing all the American cases which have given rise to educational reform, concluded:

> Thus litigation—though it is no substitute for enlightened school officials—has been instrumental in drawing attention to hidden problems and has brought to task those school officials or legislatures who have not been so enlightened. This role of litigation and the courts is well within the compass of the notion of "checks and balances" that is the heart of our Constitution. (p. 418)

Search of the Person.

The law of search and seizure in the school setting came under extensive review in New Jersey v. T.L.O (1985). In this case a vice-principal demanded to see a 14 year old girl's purse and in the ensuing search marijuana was found. The Court held that a search may be undertaken by the school official on the basis of "reasonable suspicion" and not "probable cause". Although this case was a "personal property" decision, the court set criteria for searches generally. The test of "reasonableness" appears to rest on two factors:

1. Was the action justified from its inception?

2. Was the actual search carried out and conducted in the least intrusive manner possible, in light of the age and sex of the student and the nature of the infraction.

The "balancing" philosophy between the state and the individual must be considered in relationship with the larger context of "public order". Justice Powell stated the essence of this meaning for students succinctly: "In my realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally" (p. 349).

Justice Stevens, in a strong dissent, expressed his concerns forcibly:

> The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from school teachers to policemen and prison guards. The values they learn there they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment; that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstances. The Court's decision today is a curious moral for the Nation's youth. Although the search of T.L.O.'s purse does not trouble today's majority, I submit that we are not dealing with "matters relatively trivial to the welfare of the Nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution." (pp. 385-86)

However one feels about this decision others cited below, they clearly ratify the nationally accepted notion that "reasonable suspicion" is acceptable in the school setting over the "probable cause" requirements of the 4th Amendment (Moore v. Student Affairs Committee of Troy State (1968), People v. Jackson (1971), State v. Baccino (1971), M.M. v. Anker (1979)).

Although "reasonable suspicion" has yet to be defined by the courts (Flygare, 1985, pp. 504-05), it is evident that the criterion is satisfied where there is police involvement initiated by the police State of Washington v. McKinnon (1977), or the school official (In Re. C. 1977). In searches made on behalf of a third person (another school official) mere suspicion is unreasonable (Phillips v. Johns (1930)).

In instances where drugs are involved justification for searches is very low as in the case of an anonymous "tip" (Mercer v. State of Texas (1970)), and the use of dogs in a "sniff search" has been found to be reasonable (Horton v. Goose Creek Independent School District (1982)). Even "strip searches" are held to be reasonable where drugs are the subject of a search (Rone v. Davis County Board of Education (1983)).

General strip searches are not reasonable (Bellnier v. Lund (1977)), especially where non-dangerous objects are involved, such as a missing ring (Potts v. Wright (1973)). In the latter case threats made by a teacher to students to submit to a strip search were held not to fall under a teacher's duties and therefore actionable:

> A person need not actually undertake an illegal search to be liable for violating another's constitutional rights. It is sufficient that a person act in such a manner as to be either a direct or proximate cause of the constitutional deprivation. (p. 218)

Nude searches represent the highest intrusion possible and when held to be in violation of constitutional rights give action for general damages (Wood v. Strickland (1975), Picha v. Wieglos (1976), Doe v. Renfrow (1980)).

Fischer and Schimmel (1982) accurately summarized the situation:

> More personal searches require more substantial grounds because they entail greater invasions of privacy . . . ."probable cause" is necessary for highly invasive searches, such as a strip search. Before a student's clothing or body may be searched, courts require more evidence and a higher degree of probability that the particular student is hiding illegal or dangerous materials. Arbitrary searches or mass searches based on general suspicions are frowned upon by the courts as violating the student's privacy. (p. 34 and p. 348)

Cruel and Unusual Punishment

The highly examined and controversial case of Ingraham v. Wright (1977) has sparked resentment and anger from all segments of society. Lee (1977, pp. 184-86) outlines the horrifying details: "teachers carried paddles around with them", "attacked students in a bathroom", struck students "twenty paddles to the buttocks", the hitting "across the head with the paddle" causing one student to "cough blood" and leave a "1/2" scar on the side of the forehead." The U.S. Supreme Court refused to apply 8th Amendment rights to children for historical and not substantive reasons:

> . . . we find it an inadequate basis for wrenching the Eighth Amendment from its historical context and extending it to traditional disciplinary practices in the public. (p. 669)
>
> . . . we find that corporal punishment in public schools implicates a constitutionally protected liberty interest, but we hold that the traditional common-law remedies are fully adequate to afford due process. (p. 672)

Although "due process" is a delimitation to this study it is interesting to note that the Court was of the opinion that the "common law" was sufficient to protect constitutionally guaranteed rights. For a contra argument see Goss v. Lopez (1975), Baker v. Owen (1975), Woodward v. Los Fresnos Indep. School District (1984).

Justice Powell felt the openness of schools to public scrutiny adequately protected children under the common law and opted for the status quo. Justice White emphatically dissented:

> Where corporal punishment becomes so severe as to be unacceptable in a civilized society, I can see no reason that it should become any more acceptable just because it is inflicted on children in the public schools. (p. 682)

Lee (1979) points out the fallaciousness of the "openness of public schools" argument, and confirms that "historical" thinking won out over "judicial" reasoning:

> To this author's knowledge, no evidence was presented concerning the "openness of public schools" or the effectiveness of "common law constraints." One can only conclude that Justice Powell effectively took "judicial notice" of these factors. Certainly, looking to our own experiences, many of us would

> disagree with those perceptions of public education. From a legal standpoint, moreover, it is bad practice to base decisions on standards for which no evidence is presented. (p. 186)

Rosenberg's opinion (1978) appears to verge on hostility, but does "reasonably" represent the feelings of those persons against the Ingraham decision particularly, and corporal punishment generally:

> Thus, the Ingram (sic) decision denigrates the physical and psychological integrity of children; leaves in doubt the continuing vitality of the concept of parental primacy in the sensitive area of child rearing; encourages unquestioning adherence to governmental authority; and manifests a schizophrenic form of federalism which recognizes federal authority for the promotion of law enforcement but abdicates to the states responsibility for assuring vindication of federal constitutional rights. (p. 76)

> This exemption [reasonable corporal punishment], which is not available to jailers, creates a built-in mechanism for explaining away injuries that the child receives. School authorities may assert either that the child's original misconduct was so serious that severe corporal punishment was reasonable; or that, although the original misconduct was less grave, the child resisted the paddling, necessitating the use of greater force; or that the resistance itself caused more severe injury. (p. 87)

Discrimination

Discrimination in the United States of America presents a huge and substantial problem which is bred in society generally and which is filtered down into the public school system. In the context of the educational system the decision in the Brown and Tinker decisions indicated that discrimination against children, although represented in more subtle forms, nevertheless cannot be tolerated in a free and democratic society.

Watkinson (1986, pp. 111-152) addresses fundamental rights and freedoms within schools, but like so many other authors falls short when it comes to considering discrimination of children in the area of corporal punishment on the basis of "age" or "sex". Apart from the study by Rose (1984), I have been unable to locate any other studies on the subject matter. Thus I must rely on personal assessments.

In Furman v. Georgia (1974) the court felt that capital punishment discriminates against minorities such as negros and poor people. Likewise, corporal punishment is reserved solely for use on children.

Bacon and Hyman (1979) are of the following opinion, based on Baker v. Owen (1975): "Corporal punishment is cruel because it is inflicted most often upon children who are struggling with a variety of development and social problems which are related to their self-image" (p. 171).

Flygare (1976) is of the opinion: "Finally, insofar as corporal punishment has traditionally been administered only to male students, such a practice may be illegal under federal regulations . . . which prohibits sex discrimination in the schools" (p. 346).

On the issue of the "balancing" philosophy between the state and the individual within society, C. Edwin Baker in Jacobs work (1983) adds a novel approach to discrimination to minorities which must include children:

> The "balancing" approach is particularly objectionable in respect of rights whose prime value is to protect individuals against the majority, to protect dissent, advocacy of social and political change, personal beliefs and values. When these are in issue, to inquire what mainstream society thinks is reasonable is essentially to go against the entire thrust or meaning of the constitutional rights provisions. (p. 612)

Needless to say, this is an area of educational administration and the law, under Charter rights issues, which needs to be researched more thoroughly in future studies.

Summary

As previously stated, the summary of this chapter will be general because I will attempt to state the law relative to the issues in the concluding chapter of this thesis.

The supremacy of the Charter of Rights and Freedoms under Canadian constitutional law is not in issue. What is in issue, relative to corporal punishment, is how the courts will interpret sections 1, 7, 8, 12 and 15 and is the subject matter of this thesis.

Available case law and statutes which obtained prior to and since the inception of the Charter have been examined. Legal and other treatises have been examined and weighed against dicta emanating from English, Canadian, international, and American jurisprudence.

In Chapter VI, I will attempt to formulate the law of Canada in relation to those issues under examination

The term "principles of fundamental justice" is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.

Justice Lamer,
Supreme Court of Canada
Reference Re S. 94 (2) of the Motor Vehicle Act (B.C.) (1985), 63 N.R. 266 @ p. 282.

CHAPTER VI

The Legal Status of Corporal Punishment in Canada

Canadians have always enjoyed rights and freedoms. The Charter of Rights and Freedoms guarantees the continued enjoyment of such rights and freedoms which are now entrenched in a written constitution. The Charter facilitates reevaluation of laws of Canada in light of contempory societal attitudes. One issue is the use of corporal punishment in the public educational system.

Although there have been very few judicial decisions in the educational arena, there can be little doubt that the Charter can, and will, affect how future educational administrators respond to difficult issues arising from the delicate balance between the authority of school officials and the rights of the children in their charge.

This research paper has examined the use of corporal punishment in the common law jurisdictions of the United Kingdom, the United States of America, and Canada. Traditionally, Canada has relied on English jurisprudence for guidance in Canadian courts. However, England does not have a written constitution whereas the United States of America has. Consequently, it may be that the Canadian courts will adopt American decisions as the basis for judicial reasoning in the future.

The first task, therefore, in this chapter will be to review the status of corporal punishment in the United States of America. Second, the United Kingdom and international cases will be examined. I will then examine the Canadian position with respect to corporal punishment against the relevant sections of the Charter. Finally, I will attempt to state the law of Canada as it presently stands. In conclusion I will make recommendations in both law and administrative practices based upon descriptive analysis gained from an examination of all common law jurisdictions heretofore referenced. It is hoped that such analysis will be of assistance to school officials in the formalization of school policies.

Overview of American Jurisprudence

There can be little doubt that corporal punishment in American schools is deeply entrenched. Only a few states have abolished its use. The data overwhelmingly support the proposition that it is still a widely used form of discipline. Its continued use is based in traditional acceptance of society generally, and particularly stems from religious convictions of the white middle-class majority. The underlying concept is one of authority and power of school officials over children. Owens and Straus (1979) refer to American society as a "culture of violence" and seem very clear in their opinions:

> A fundamental assumption underlying this investigation is that the disposition to use violence is a learned behavior and that much of this takes place in childhood through the actual experience of violence. Thus, the general hypothesis of the study is that the more a person experiences violence as a child, the more likely he is as an adult to approve of the use of violence as a means of social control. (p. 108)

Rust and Kinnard (1983) in their study found a highly significant correlation between the dogmatic individual, neuroticism and use of corporal punishment. The researchers expressed strong views:

> One of the main characteristics of the closed-minded individual, as described by Rokeach (1960), is an intolerance of those with opposing beliefs and the corresponding, strong rejection of new and different ideas : . . . The dogmatic individual also places a high value on authority. Perhaps the use of corporal punishment is related to the educator's need for students to comply with authority. Dogmatic educators may see misbehaving students as a serious threat to their authority. (pp. 93-94)

It appears, therefore, that school officials in the United States advocate the use of corporal punishment and the statistics support the proposition that it is indeed administered in large quantities throughout the United States of America.

As an examination of the case law has indicated, this position is supported by American jurisprudence. Lee (1979) believes that, "for all practical purposes, the use of corporal punishment in the public schools has become a political, and not a judicial issue" (p. 193).

The search of the person, following the criterion in New Jersey v. T.L.O., is the subject of wide and liberal application, especially where illicit drugs are involved. Zirkel and Glickman (1985) succinctly state the essence of the situation in the United States: ". . . the more intrusive the nature of the search the more justification the administrator should have both for or regarding the reason for the search, and the likelihood of the student's guilt (p. 120).

Expansion of student rights in the United States, notwithstanding the U.S. Constitution's emphasis on protection of individual rights, to facilitate the abolishment of corporal punishment is highly unlikely. Hazard (1975) clearly identifies the apparent "power struggle":

> Students have long since heard about their constitutional rights and increasingly demand them while in school. School people face a decided uphill battle to preserve the status quo in school practices so contrary to the mores and practices in the "outside" world. (p. 609)

Commenting on the Ingraham case, Wallerstein (1979) views the situation more realistically:

> No one could have realistically expected the Supreme Court to outlaw corporal punishment. That might happen at some future time, but only after setting forth the overwhelming evidence - medical, sociological, psychological - that school corporal punishments damage not only the individual but the community. (p. 215)

Self discipline as a motivation for acceptable behavior by students is unlikely in an authoritarian system which allows the use of physical force in order to maintain adherence to school policies.

The English and International Positions

In the United Kingdom, corporal punishment is no longer an issue in the public school system. It has been expressly abolished by parliament in 1986. This decision brings Britain in line with the majority of European and Communist countries.

This position is diametrically opposed to the state of affairs prior to the legislative enactment. The Society of Teachers Opposed to Physical Punishment, in a massive study of almost half the secondary schools in England and Wales, dispelled the myth that corporal punishment was not prevalent in the U.K. The survey confirmed that 81% of teachers in the educational system administered corporal punishment on a regular basis, once every 19 seconds (STOP, 1984, p. 1).

Manning (1983), based on the viewpoint of the European Council on Human Rights, added a further probable reason for the legislation:

> The court also found that the punishment was degrading. It stated that the humiliation or debasement must be more than that which exists in the case of generally accepted forms of punishment imposed by courts for criminal offences. In the case of corporal punishment the institutional use of physical violence by one human being against the other and the assault against a person's dignity and physical integrity involved were the factors that made it degrading. (p. 443)

Canadian Charter Provisions

Section 1: "Balancing Provisions"

The rights and freedoms guaranteed to the citizens of Canada under the Charter are not absolute (Operation Dismantle v. The Queen (1985)). However, "compelling factors" are required to justify governmental intervention on such rights and freedoms (R.L. Crain Inc. v. Couture (1984)).

The burden of proof lies upon the party claiming the exemption under section 1 (Quebec Assn. of Protestant School Boards v. A.G. Quebec (1983)). Any exemption claimed under section 1 must be a "reasonable limit" in a "free and democratic society" (R. v. S.B., 1983). Where such a restriction is held to be "unreasonable" the legislation of any branch of government will be struck down (R. v. Oakes, (1986); Re. s. 94(2) of the Motor Vehicle Act (B.C.) (1985)).

The test for "reasonable limit" is based on a two-fold conjunctive test: (1) Is the impediment of "sufficient importance?" and (2) were the means used to accomplish the purpose "reasonable under the circumstances?" (R. v. Oakes (1986)). In R. v. Bienart (1985), the court held that although section 10(3) of the Department of Education Act contravened section 10 of the Charter, it was nevertheless a reasonable limitation "prescribed by law."

The question whether section 1 will be used in connection with other sections of the Charter has yet to be resolved by the courts. For opposing views see Watkinson (1986), MacKay (1985), Wilson (1985), Greschner (1984-85), Jacobs (1983). However, Quebec Assn. of Protestant School Boards v. A.G. Quebec (1983) indicates "strong argument" is required to conclude that independent sections have their own modifiers.

Section 7: "Security of the Person"

In Reference Re s. 94(2) of the Motor Vehicle Act (B.C.) (1986), the court held that section 7 should be given a wide and "generous" interpretation. The inclusion of seizure of "restaurant property" in consideration of loss of a livelihood was held to be an encroachment on to the "security of the person" (Queen v. Fisherman's Wharf (1982)).

Watkinson (1986, p. 164) believes corporal punishment will be held to be a violation of either "liberty" or "security of the person," or both, because it is physical force applied against the body of the person. Schmeiser and Wood (1985) feel that corporal punishment definitely offends section 7:

> The section 7 guarantee may prove to be the most important in the context of corporal punishment. Corporal punishment clearly affects the student's right to security of the person. The deprivation of this right must therefore be in accordance with the principles of fundamental justice. (p. 66)

Section 8: "Search and Seizure"

Search of the person is clearly an invasion against the body of the person, and therefore, a violation of section 7 (R. v. Lerke (1986)), notwithstanding the Regina v. J.M.G. (1986) case in the school setting.

Hunter Dir. of Investigation & Research Combine Branch v. Southam Inc. (1985) failed to address the issue of whether a warrantless search was a "reasonable" limit when applying section 1 to section 8. However, it is reasonably clear that "suspicion alone" and not "probable cause" is the acceptable standard in the school environment (R. v. L.L. (1986); R. v. Bent, [1987]; R. v. H. (1985)). Strip searches involve the most intrusive invasion of privacy and, therefore, the reason must be clearly evidenced and be based on "probable cause" (R. v. Morrison (1985); R. v. Fequet (1985)); although there is authority to the contrary (R. v. Guberman (1985); R. v. Therans, [1985]).

I am of the opinion that corporal punishment (including strip searches) will be held to be a violation of both section 7 and 8 of the Charter. Lesser searches of the body and clothing of a student may be deemed to be a "reasonable" limit pursuant to section 1, especially in instances where illicit drugs are involved.

Section 12: "Cruel and Unusual Treatment or Punishment"

I believe that "cruel and unusual treatment or punishment" will not apply to corporal punishment in the schools for two reasons. First, the courts have held that capital punishment does not fall within the category (R. v. Miller & Cockrail (1976)). Consequently, I feel that all lesser forms of punishment will not be held to be cruel (Re Gittens and The Queen (1982); R. v. Langevin (1984); Re Miller and R. (1982); Mitchell v. A.G. Ont., (1983)).

Second, if the "conjunctive test" is applied (Re Miller and R. (1982)), the operative word "cruel" will take precedent over "unusual treatment or punishment." Even if Laskin's "disproportional test" is applied (Mitchell v. A.G. Ont. (1983)), notwithstanding the inclusion of "treatment" over the American counterpart, the data clearly show that corporal punishment is not "unusual"; quite the contrary, it is widely used and accepted by school officials (C.E.A., 1967; Thorn, 1971; Sloan, 1977; Welch & Halfacre, 1978; Hindle, 1987); and supported by society generally (Shalka, 1973; M.E. Ont., 1981; Gallop, 1976).

Section 15: Discrimination on the Basis of "Age" and "Sex"

Since there is an absence of case law on the subject matter, this segment is structured in logic not law. The basic premise to my argument is that section 43 of the Criminal Code clearly discriminates against children. The section provides a defence to teachers and school officials acting under the doctrine of in loco parentis and perhaps also under the discipline provisions of the School Act, 1988. This situation persists over what would otherwise be an assault pursuant to section 265 of the Criminal Code. Section 43 allows for an assault to be perpetrated on children while section 265 protects adult members of society, clearly a discrimination on the basis of age.

If section 7 of the Charter, "security of the person," covers all human beings, then section 43 also is in violation of Charter rights. I contend that section 1 of the Charter "reasonable limits," cannot apply to corporal punishment. Section 43 is ultra vires when read in conjunction with section 7 of the Charter. The supremacy of the Charter must prohibit such blatant acts of discrimination. The Law Reform Commission of Canada (1984, p. 44) states this premise clearly and unequivocally:

> Instead of prohibiting violence in general but then allowing it for punishment of children, the law should give a clear and unblurred message to the effect that all unnecessary violence is off limits. Emergency situations in the home or school are covered already by the law of necessity. All other situations should exclude the use of force. The rule in Criminal Code section 43 should be abolished. (p. 44)

Searches of the person, and especially strip searches, in my view, will not be protected by section 43 because the section refers to "using force by way of correction." The usual meaning attached to correction is after the fact; a search undertaken beforehand in order to establish the fact is outside the scope of the section.

Wilson (1985) ties in "age" discrimination with section 1 of the Charter:

> The specific inclusion of "age" in section 15 should result in the child being treated both as possessing rights and freedoms qua person, and as having the right to challenge discriminatory legislation. Challenging discriminatory legislation will have the objective of holding any stand-in-decision-maker for the child accountable; such accountability should be required by section 1, which will itself necessitate the use of extensive and compelling evidence. (pp. 321-22)

Rose's (1984, p. 439) data indicate that corporal punishment is used more on boys than on girls, and is more repetitious in its use. If this is true in the Canadian context, then corporal punishment also discriminates against children on the basis of sex.

Therefore, I am of the opinion that corporal punishment discriminates against both "age" and "sex" under sections 7, 8, 12, and 15. Clearly, section 43 of the Criminal Code discriminates against children as a class.

Legislative Enactments and "Child Abuse"

Under Chapter IV relevant legislation was examined in light of corporal punishment in historical and contempory societies. The School Act, 1988 gives to principals and teachers the authority to maintain discipline in schools. The J.M.G. (1986) case supports this proposition.

In apparent conflict with this position is Child Welfare legislation which defines physical signs of child abuse that cannot be tolerated in modern society. Corporal punishment which causes welts, bruises and even discoloration falls within the definition of child abuse. If strapping, caning or other forms of physical punishment are administered by parents then the courts may convict the perpetrators of assault. In R. v. Baptiste and Baptiste (1981) the court was of the opinion:

> The concern of today's community for child abuse should be reflected in the standards to be applied. The maxim, "spare the rod and spoil the child," does not enjoy the universal approval it may have had at the turn of this century . . . . (p. 443)

In America, one case has held that corporal punishment in the school amounts to "child abuse." In Smith v. W. Va. State Board of Educ. (1982) the court awarded damages against a teacher for hitting an 11 year old boy three times on the legs with a paddle:

> We believe the doctrine of in loco parentis . . . in the light of the present day standards and legislative enactments in the child abuse area cannot be interpreted as permitting corporal punishment of public school children by means of a paddle, whip, stick or other mechanical devices. . . The very nature of these devices is such that their use often leads to excessive force and injury. We believe that the doctrine of in loco parentis cannot be interpreted in light of current attitudes, particularly as reflected in our child abuse statutes, as permitting corporal punishment by mechanical devices. (p. 687)

Attitudes in society have changed since the Metcalfe and Robinson decisions. The Young Offenders' Acts and Child Welfare legislation clearly indicate that children are no longer to be treated as chattels within society. The doctrine of in loco parentis and the authority of the schools to maintain discipline are subject to societal changes embodied in legislated law. Children now have obligations to society and therefore must be accorded corresponding rights. The Child Welfare Act, 1984, in Alberta, makes it mandatory for society to protect children from abuse and such governmental protection takes precedent over both parental rights and school policies. The common law doctrine of in loco parentis, and the statutory provisions of the various School Acts, are now subject to review by the Charter and Child Welfare legislation.

In my opinion, Bargen (1961, p. 129) was incorrect when he stated that section 43 gave the right to teachers, qua teachers, to administer corporal punishment in schools over the wishes of the parents, school board policies, and provincial enactments. Bargen's interpretation may be challenged for the following reasons:

First, under section 93 of the B.N.A. Act, 1867, now the Constitution Act, 1982, exclusive jurisdiction in matters of education is given to the provinces. This position has been proven time and time again in the courts of highest jurisdiction.

Second, under section 91(27), exclusive jurisdiction in matters of criminal law is given to the federal government.

Third, under the doctrine of paramountcy, a federal statute seeking to operate in "unclaimed" or "unsure" jurisdictional areas, takes precedence over provincial legislation pursuant to s.91.

Fourth, Bargen (1961, pp. 125-26) referred to the "general powers granted by federal authority." I assume that Bargen (1961, pp. 125-26) reasoned that "corporal punishment" fell under criminal jurisdiction by virtue of the operation of s.43. Therefore the provincial governments were precluded from legislating in matters dealing with corporal punishment i.e, the provinces had no power over corporal punishment.

I feel that Bargen was wrong on both counts. There is no evidence of a clash of federal and provincial legislation. The provinces deal with "education", and the federal government deals in "criminal matters." The Criminal Code does not deal in "general matters," quite the contrary it deals with "specific" areas of criminal law. Section 43 provides a teacher with a defence to a criminal charge of assault. It is not enabling legislation, that is, it does not give the power or grant authority to teachers to inflict corporal punishment in the schools. It only, and specifically, provides a defence if the acts of the teacher "are reasonable under the circumstances."

By way of illustration, consider Lord Denning's use of the "sword and shield" analogy (High Trees House case). Does the Criminal Code give a right, authority or power to the teacher, as a "sword" would? Or, is it merely a "shield," or a defence to a criminal charge of assault? I feel the answer is very clear. Since section 43 is not enabling legislation it is, without a doubt, within the jurisdiction of the provinces to abolish corporal punishment in the schools.

It naturally follows, a priori, that s.43 would not be a defence in a civil action for assault as s.43 is specifically restricted to the federal jurisdiction in criminal matters. And, since the jurisdiction is changed from criminal to civil law, then the burden of proof changes. No longer would there be an onus on the Crown to prove beyond "a reasonable doubt" that the acts were "excessive force"; the acts of the teacher and the surrounding facts would be judged on "a preponderance of evidence."

It further would not preclude a Board of Education from abolishing corporal punishment in specific schools under its jurisdiction and from dismissing a teacher who administers corporal punishment against the Board's policy. It would, therefore, be of little comfort to an unemployed teacher to know that he or she would not be liable to criminal prosecution by virtue of section 43 of the criminal code if his or her conduct resulted in loss of employment.

While it is questionable whether a school board could alter or change the common law, by virtue of the fact that a board's authority and power stems from specific provincial statutes, it clearly is within the powers of the provincial legislatures to abolish corporal punishment acting pursuant to s.93 of the B.N.A. Act, which is now embodied in the Constitution Act, 1982.

Bargen's proposition in light of the Charter, the Young Offenders' Acts and Child Welfare Acts is now totally indefensible. Corporal punishment is an assault and, if reasonably excessive, it is child abuse.

Freedom to choose is often accompanied by controversy. The airing of differences is a necessary first step toward a more cohesive view of what we desire as a people. And it is this growing community of vision that must guide our future endeavors in education.

Dr. Walter H. Worth
Chairman and Commissioner,
Report on Educational Planning
October, 1972

CHAPTER VII

Summary, Conclusions, and Recommendations

As this thesis has shown, corporal punishment, in the absence of legislation (B.C. regulation #436/81) or school board policies to the contrary, may be administered by teachers or school administrators in loco parentis in the school setting. The force used must be "reasonable." "Reasonable" has been given a wide and liberal interpretation. Although there have been attempts to change the status quo and bring the concept of corporal punishment more in line with contempory judicial reasoning, the basic proposition remains unchanged.

Only in extreme cases have Canadian courts held corporal punishment to be considered "excessive force." This position was supported in the United Kingdom prior to the abolishment of corporal punishment in 1987 (Education (No. 2) Act, 1986). This also is the general proposition in the United States of America.

Section 43 of the Criminal Code provides a defence to teachers or persons in loco parentis against a charge of assault under section 265 when corporal punishment is administered in a "reasonable" manner to students in the school setting. Bargen (1961, p. 127) felt that section 43 gives teachers the right to administer corporal punishment, and because of federal jurisdiction, such right cannot be taken away by provincial legislation or School Board policies. Bargen was of the opinion that this "right" is transferred from the parents under the doctrine of in loco parentis to the teacher in his, or her, personal capacity and consequently cannot be delegated to other educational officials.

Bargen (1961) appears, therefore, to have correctly synthesized the impact of case law on the effect of administering "reasonable" corporal punishment in the school setting.

It further appears to be a "conservative" assessment in light of the expanded applications in more current judicial decisions heretofore examined:

> 4. Punishment is considered reasonable when:
>
> (a) It is for the purpose of correction and without malice.
> (b) There is sufficient cause for punishment.
> (c) It is not cruel nor excessive and leaves no permanent marks or injury.
> (d) It is suited to the age and sex of the pupil.
> (e) It is not protracted beyond the child's power of endurance.
> (f) The instrument used for punishment is suitable.
> (g) It does not endanger life, limbs, or health, or disfigure the child.
> (h) It is administered to an appropriate part of the pupil's anatomy. (p. 12)

In England, delegation downward to a person under the teacher's supervision was permissible. In the U.S.A. there appears to be conflicting authorities; a superintendent was held not to have the power to administer corporal punishment, whereas a school trustee and a "non-qualified" teacher were so empowered.

If English jurisprudence is applied in the Canadian context then delegation to subordinates will be allowed. If American authorities are applied, downward delegation will be allowed while delegation to a superior is in question. As the Canadian law stands, and I agree with Bargen on this point, delegation is not permissible at all. Consequently, the apparent transfer of authority to the "front office" or to person in a "non-teaching" position is clearly illegal.

In direct contrast to this position are two decisions which have extended the categories of those protected under the doctrine of in loco parentis to a school bus driver and a counsellor. Both decisions fly in the face of the dictum contained in the Supreme Court of Canada's decision in R. v. Ogg-Moss (1984), a Charter case. The decision of the Ontario Court of Appeal in the case of Regina v. J.M.G. (1986), which allowed the search of person pursuant to provisions of the School Act as necessary for the maintenance of discipline, undoubtedly complicates the situation if search of the person is held in violation of sections 7 and 8. "Security of person," "unreasonable search and searches" as specified in the Charter, are in direct conflict with section 43 of the Criminal Code.

As can be readily appreciated, the intertwining and interrelationship of sections 43 and 265 of the criminal code, sections 1, 7, 8, 12, 15 of the Charter, and the "discipline" sections of the various School Acts create a complex "house-of-cards" which could come crashing down as a result of one future Charter - rights decision.

The data contained in Chapter III clearly dispel the myth that corporal punishment is not an issue in Canada. It is still the most widely used form of discipline in Canada. This proposition is also supported by data from the United Kingdom.

In Chapter V it was shown that the Charter is the supreme law in Canada. Exclusive jurisdiction in education is granted to the provinces pursuant to section 93 of the Constitution Act, 1982. The use of American jurisprudence in Canadian decisions has still to be decided.

The issue of whether the interests of society will prevail (s.1) over protection of the individual, under the provisions of sections 7, 8, 12 and 15 of the Charter, has yet to be decided.

Under section 7 "security of the person," the courts have indicated that the phrase should receive a "wide and liberal" interpretation. Consequently, I am of the opinion that corporal punishment will be held to be a violation of section 7 and also section 8 "unreasonable search and seizure," notwithstanding the Regina v. J.M.G. (1986) decision.

Warrantless searches by peace officers must be based on "probable cause," although searches of the person in the school setting will require only "mere suspicion". I am of the opinion that "strip searches" will require a search warrant or be based on "probable cause," except in the situations where the search is made for illicit drugs.

Section 12, "cruel and unusual treatment or punishment," will not likely be extended to corporal punishment as the court has indicated that capital punishment is not "cruel" punishment.

Whether or not "cruel and unusual" will be read conjunctively, or be subjected to the "disproportional test" is, in my opinion, irrelevant. Corporal punishment is "usual" and not "unusual" form of punishment according to the available data (Chapter III).

I believe that section 15 will be applied against section 43 of the Criminal Code as discrimination against children on the basis of "age." If Canadian data support the proposition that corporal punishment is inflicted on boys disproportionally to girls, and more frequently, then it is possible that section 43 of the Criminal Code will be also struck down on the basis of "sex" discrimination.

Knowledge and Education

The available data appear to indicate that educators are not sufficiently knowledgeable of legal matters which directly affect them. The educational system does not provide educational administrators the necessary knowledge to address legal issues in a competent manner. There also appears to be a great reluctance within the educational system to adapt to legislative enactment and common law decisions. As a result of an informal telephone survey of educational administrators across Canada, responses caused Balderson (1983) to comment: "Most of the school executives we contacted were unaware of the rights guaranteed in the Canadian Charter. Perhaps principals should start the school day by reading students their rights" (p. 36).

Bargen (1961) stressed the importance for educators to keep abreast of legal decisions which not only have direct bearing on educational matters, but also jurisprudence which may affect school administration in the near future. Historically, it is said that "the law" lags behind societal attitudes by decades. The nature of the common law, legal structures, and the judicial system are notorious for slowing down the process of change. To speed up the "system" legislative enactments are implemented to repeal, change, amend, create, modify or act on existing laws in some way, in order to reflect current desires and requirements of contemporary society.

The Charter, and the statutes heretofore examined, reflect the impetus for changes which educational administration must be prepared to accommodate. Menacker and Pascarella (1983) in a survey of 299 American principals and vice-principals on 13 U.S. Supreme Court decisions affecting education, gave such educators only a 64.4% passing grade:

> Most important, our findings reveal an ineffective and haphazard communication network . . . The dispensing of information on school law should begin in teacher preparation programs, should continue in programs preparing school administrators, and should become a regular part of inservice programming for educators at all levels and in all locations. (p. 426)

Hazard (1975, p. 608) and Hummel (1985, pp. 3-11) support this proposition. Schimmel and Fischer (1988) offer an explanation for this serious deficiency of American educators:

> Why are so many educators poorly informed about the rights of parents and students? Because most of these rights did not exist when the educators were students and because they learned almost nothing about this subject during their education. As a result, they have had little training in applying these rights in their schools, and little has been written that could assist them. (p. 2)

Schimmel and Fischer (1988, p. 232) point out that less than 20% of students have been exposed to law-related education. Zimmerman (1974) feels that "if the American democracies are to approach the twenty-first century as a strong and viable system, the young people in our schools must be well-versed and competent in handling guaranteed human rights" (p. 247).

Educators appear not only to be not properly informed and educated in legal matters which may directly affect them, they are also resistant to change. This is borne out by the fact that there are no courses devoted to school law offered in the Faculty of Education at the University of Alberta at the undergraduate level, and there is only one legally oriented course offered at the graduate level, which is optional, intermittently offered, and taught from a historical point of view. Watkinson (1986) assesses the situation realistically:

> Finally, not only do educators need a general understanding of the Charter and its implications, but, perhaps more importantly, they need to be concerned about their attitudes towards student rights and the effect these attitudes have on the education system . . . . Educators already seem impatient with the role the courts are playing in the education system, but this is not going to change. If anything, the role of the courts will increase. It is hoped that if school leaders have an accurate understanding of court decisions affecting them, they may find them a help rather than a hindrance and, at the same time, avoid the cost and disruption of legal challenges. (pp. 8-9 and p. 11)

Conclusions

It is essential that those in power in the educational milieu address the problem of the administering of corporal punishment in the public school system. There is a very high probability that corporal punishment violates the guaranteed rights under sections 7, 8, 12, and 15 of the Charter.

Section 7 guarantees that all Canadian citizens have the right to life, liberty and particularly, for the purpose of this thesis, "security of the person." Corporal punishment clearly is intentional physical force against the body of the student and therefore violates the "security of the person."

Section 8 guarantees that "everyone has the right to be secure against unreasonable search and seizure." Searches of the person and particularly strip searches are extreme invasions of privacy. This contention adds additional support for the proposition that a redefinition of corporal punishment is needed to reflect contempory societal expectations. Consequently, it is essential that the school officials have specific evidence of a breach of discipline before undertaking such a search. The search, if warranted from its inception, must be carried out with the minimum of intrusiveness, quietly, and conducted with the utmost of discretion. "Reasonableness" is the key consideration; therefore, searches should only be conducted when absolutely necessary. Respect for the student's right to privacy will in turn foster respect for the school official's authority and duty to maintain discipline within the school environment.

Section 12, "cruel and unusual treatment or punishment," will not likely extend to cover corporal punishment. Case law in England, U.S.A., and Canada indicate that the highest form of force upon the body of a person (i.e., death) is not "cruel" treatment or punishment. Further, the data indicate that corporal punishment is highly prevalent in Canadian schools and therefore not unusual in the context of section 12.

Section 15 provides for "equal treatment" before the law for all peoples in Canada. The defence provisions under section 43 of the Criminal Code provides immunity against assaults on children while section 265 protects adults from assaults. The law clearly discriminates against children on the basis of "age," and therefore is in violation of section 15 Charter - rights.

The data, although sketchy, support the proposition that corporal punishment is administered more to boys than to girls, and more frequently. Consequently, it is possible that corporal punishment offends section 15 of the Charter on the basis of "sex."

Recommendations: Affirmative Action

On the basis of the aforementioned analysis it is recommended to education authorities:

1. That corporal punishment be banned in the schools by either provincial legislation or school board policies, or both;
2. That educational administrators develop and use alternative methods of maintaining discipline in the schools;
3. That school authorities provide legal training in laws affecting education;

4. That school officials promote "self discipline" within students by identifying "rights" and the corresponding "responsibilities";
5. That reform in the area of "student rights" emanate from within the educational institutions rather than await legal impositions on the educational system.

Recommendations in law are:

1. Abolish section 43 of the Criminal Code or alternatively change the section to a liability section;
2. Amend section 265 of the Criminal Code to reflect better case and statute law ;
3. Enforce Child Welfare legislation against school officials who perpetrate corporal punishment;
4. Follow up on reported "child abuse" cases in order to evidence infractions of the reporting section of Child Welfare legislation;
5. Prosecute all corporal punishment incidents that cause injuries as defined by Child Welfare legislation;
6. Encourage parents to litigate against school officials who administer corporal punishment which causes injury as defined by Child Welfare legislation.

Future Emphasis in Education

If corporal punishment is in violation of rights under the Charter it must be abolished. The impetus must come from the education community or legislative authorities and not from judges or lawyers. In such circumstances, I am of the opinion that school officials will take a positive step towards "professionalism."

Even if the vast majority of school officials and the public at large advocate the continued use of corporal punishment in schools, it does not make physical punishment ethically or morally justifiable. Violence breeds violence and those who advocate violence against children on religious grounds should reconsider their texts (St. Matthew 18: 1, 2, 3, and 6).

Hindle (1987) provides educators with a view of the future if corporal punishment is allowed to continue:

> . . . between 1969-79 approximately 30 Saskatchewan teachers faced assault charges after having used corporal punishment. All were acquitted at trial or on appeal. However, between 1980-85, four Saskatchewan educators faced assault charges - and all were convicted [my emphasis]. One can predict with confidence that the use of corporal punishment in schools will continue to be an important issue for the courts. (p. 4)

The fact that corporal punishment "is still on the books" predisposes its continued use, and its continued use sends out the message that the use of physical force, as a problem-solver, is acceptable in Canadian society. It should not be allowed to continue if violence is to be decried in a progressive and humane society.

It is hoped that this research will assist educators to reassess corporal punishment in a contemporary context. The Charter must be examined in greater detail in future research in order that educators will more clearly identify issues that affect school matters and make intelligent decisions on educational policies and procedures.

In relationship to the issue of corporal punishment I can do no better than conclude this treatise with the words of one educator. Maynes (1987) is of the opinion that:

> Corporal punishment should be eliminated for moral and ethical reasons . . . Students learn more from what we do than from what we say! If we truly believe in non-violent means of resolving conflicts, then we must act out that belief. We cannot do so and maintain corporal punishment (p. 8).

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